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In The

# Supreme Court of the United States

STEPHEN E. JONES
and DOYLE CLARK,

*Petitioners,*

*v.*

UNITED PARCEL SERVICE, INC., and
LOCAL 41 OF THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

## INTRODUCTORY STATEMENT

Defendants in this employment discrimination and labor relations case filed three separate motions for summary judgment. Plaintiffs filed a consolidated opposition memorandum. Without notice or an opportunity to be heard or to correct deficiencies, the district court struck all of Plaintiffs' factual assertions as a sanction for Plaintiff's counsel's violations of a local rule. The court then deemed all of Defendants' assertions admitted, granted the summary judgment motions and dismissed the action.

1. Whether permitting imposition of death-knell sanctions was a denial of due process and an impermissible departure from the accepted and usual course of judicial proceeding.

2. Whether the Eighth Circuit violated due process when it permitted interpretation of a local rule to allow both limitation of contravening facts and elimination of hundreds of admitted facts.

3. Whether the Eighth Circuit's decision is in conflict with those of other circuits to the extent it affirmed the district court's selective gleaning of the record for facts favorable to movants, while ignoring direct evidence of discrimination.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners Doyle Clark ("Clark") and Stephen Jones ("Jones") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

## OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit is reported at *Jones v. United Parcel Service, Inc.*, 461 F.3d 982 (8th Cir. 2006), and is reproduced at the Appendix to this Petition ("Pet. App.") at 1-29. The Eighth Circuit's order denying rehearing and rehearing en banc, is reproduced at Pet. App. 126. The order of the district court granting summary judgment with regard to Plaintiff Doyle Clark is unpublished and is reproduced at Pet. App. 30-79. The order of the district court granting summary judgment with regard to Plaintiff Stephen E. Jones is unpublished and is reproduced at Pet. App. 80-23. The judgment of the district court granting summary judgment and dismissing all claims with regard to both plaintiffs is unpublished and is reproduced at Pet. App. 124-25.

## JURISDICTION

The court of appeals entered its judgment on August 22, 2006. Pet. App. 1 and denied rehearing and rehearing en banc on November 9, 2006 Pet. App. 137. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). Original federal jurisdiction of the underlying action was found at

28 U.S.C. §§1331, 1343, and 1367, and at 29 U.S.C. §§185 and 412.

## STATUTES OR OTHER PROVISIONS INVOLVED

Rule 56, Federal Rules of Civil Procedure is reproduced at Pet. App. 138-39.

Local Rule 56.1, United States District Court for the Western District of Missouri, is reproduced at Pet. App. 139-40.

## STATEMENT OF THE CASE

### A. Factual Background.

Clark and Jones each worked more than 20 years for Defendant UPS, before they were terminated from that employment. Jones, at age 48, had 27 years of union seniority and an admirable driving and disciplinary record. At his termination, he served as Head Steward for the Feeder Drivers at his workplace. Clark, at age 44, had worked for UPS for 21 years as a part-time UPS employee and then for two years as a full-time employee, as a package sorter and a hazardous materials responder.

In the summer of 2000, a political rift developed among members of Local 41's Executive Board. Clark and Jones were part of a union reform movement and became active and vocal political adversaries of the incumbent Union leadership. In 2002, they were both fired immediately after a International Brotherhood of Teamsters Union Local 41 officers's election, in which Jones was the campaign manager for a reform slate that included Clark.

When he won that election, Clark became the first African-American elected to the Local 41 board of directors in his own right.

**B. Proceedings Below.**

Following their terminations, Plaintiffs sued Defendants in the United States District Court for the Western District of Missouri. Plaintiffs sued both Defendants for violating the Labor Management Relations Act ("LMRA") and sued Local 41 for violating the Labor Management Reporting and Disclosure Act ("LMRDA"). Clark sued UPS for race and age discrimination, and Jones sued UPS for age discrimination and retaliation for whistleblowing.

UPS and Local 41 filed three separate motions for summary judgment. They submitted a total of 577 separate statements of fact they claimed were both material and uncontroverted. Although the record contained depositions of more than 50 witnesses with 7,781 pages of testimony, along with 117 affidavits and 39,000 pages produced by Defendants in discovery, Defendants identified no controverted issues of material fact in that record. Local Rule 56.1 requires a numbered response to each statement of fact submitted by Defendants, along with additional numbered statements of Plaintiffs showing controverted issues of material fact. Pet. App. 139-40. With court approval, Plaintiffs filed a single, consolidated opposition brief. It contained the required 577 responses, along with 948 factual contentions from the record showing contested material issues of fact. Defendants filed replies. In sum, Defendants filed 837 pages of motions and replies, and Plaintiffs filed 480 pages in a single opposition brief. The district court granted leave for all parties to

exceed the page limits provided for non-factual submissions in Local Rule 56.1.

Without warning, the district court then struck Plaintiff's entire factual submission and all their responses to Defendants' facts, deemed Defendants' facts admitted, granted monetary sanctions against one of Plaintiff's attorneys for violations of Local Rule 56.1, and granted summary judgment in favor of Defendants on all counts.

Plaintiffs filed separate appeals, which were consolidated for briefing and submission. The Eighth Circuit affirmed in a panel decision and rehearing and rehearing en banc were denied.

## REASONS FOR GRANTING THE PETITION

### I. PERMITTING IMPOSITION OF DEATH-KNELL SANCTIONS UNDER THESE CIRCUMSTANCES WAS A DENIAL OF DUE PROCESS AND AN IMPERMISSIBLE DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDING.

The Eighth Circuit affirmed the district court's decision that, because it found local rules violations by Plaintiffs' attorneys, it would simply dismiss all of Plaintiffs' evidence and deem all of Defendants' facts admitted. The district court did not specify any statute under which it chose to sanction. Therefore, it could only have taken such action under its inherent power, which includes the power to select appropriate sanctions. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-45 (1991).

A summary judgment motion unopposed by controverting facts should be granted, if the motion is facially sufficient. *Celotex v. Catrett*, 477 U.S. 317 (1986). Therefore, such a dismissal is a devastating sanction, and one that should never be considered simply for local rules violations that can be redressed by other means. *See, e.g., Otero Vazquez v. American Home Prod. Corp.*, 2005 WL 2001299 at *3 (D. Puerto Rico, August 19, 2005) (due to partial compliance with the rule and nature of discrimination litigation, "the court finds that striking her proposed facts is too harsh a sanction."); *CTC Communications Corp. v. Bell Atlantic Corp.*, 77 F. Supp. 2d 124, 128 n.3 (D. Me. 1999) (refusing to strike fact statement as noncompliant because "striking the entire document is not the appropriate sanction."); *Helm Financial Corp. v. Iowa Northern Railway Company*, 214 F. Supp. 2d 934, 961 (N.D. Iowa 2002) ("Such a sanction would be overkill, that is excessive punishment for a technical failure when both parties have fully briefed their arguments.")

These cases show certain, consistently stated, basic concerns of federal courts: in controlling attorney conduct and enforcing local rules, judges must not forget the basic rights of litigants. An effort to enforce local rules must not outweigh the rights of litigants to a fair and full consideration of their claims and defenses, whether on summary judgment or at trial. At a bare minimum, federal courts uniformly demand prior notice and a fair opportunity to cure such deficiencies before imposing drastic sanctions that affect the litigants.

A good example of the accepted and usual course of judicial proceedings where there is a finding of rules violations is found in *Northwest Bank & Trust Co. v. First Illinois National Bank*, 221 F. Supp. 2d 1000 (S.D. Iowa

2002). There, the judge refused to strike a plaintiff's factual submission for failure to comply with local rules without first notifying the plaintiff of noncompliance and providing an opportunity for resubmission, reasoning:

> Justice is not served by taking a heavy-handed approach to violations of local procedural rules. Non-compliance by counsel slows the judicial process and is certainly frustrating to both opposing counsel and to the Court. Imposing Draconian sanctions for isolated rule violations, however, does far more than simply punishing the attorneys. Rather, such an approach destroys the vital right of the, most likely, innocent client to have her day in Court simply because her attorney mistakenly violates a local procedural rule. This Court will not be a party to such an egregious offense of anyone's right to due process. . . .

The court entertained a motion to strike **only after** the plaintiff repeatedly failed to resubmit a properly supported factual submission, in violation of the court's order. *Id.* On appeal, the Eighth Circuit affirmed the district court, in large part because the plaintiff had been given multiple opportunities to cure the deficiencies. *Northwest Bank & Trust Co. v. First Illinois National Bank,* 354 F.3d 721, 725 (8th Cir. 2003).

Furthermore, a single instance of perceived procedural failure is not sufficient to justify dismissal as a sanction. *Hutchins v. A. G. Edwards and Sons, Inc.*, 116 F.3d 1256 (8th Cir. 1997). Without a showing that Plaintiffs willfully violated some order of the district court, there must be clear and convincing evidence that Plaintiffs exhibited "a pattern of abuse," *Popkin v. Stern*, 196 F.3d 933 (8th Cir.), *reh. denied* (1999), shown by "a clear record

of delay or contumacious conduct." *Skelton v. Rapps*, 187 F.3d 902, 908 (8th Cir. 1999). *Rodgers v. Curators of University of Missouri*, 135 F.3d 1216, 1219 (8th Cir. 1998) (Finding repeated instances of misconduct); and *Hunt v. City of Minneapolis, Minn.*, 203 F.3d 524, 527-28 (8th Cir. 2000) (finding a "persistent pattern" of willfully disregarding both the court's orders and the Federal Rules). Here, the record contains no finding or evidence of bad faith or willful disobedience of a court order. At no time prior to its orders striking all of Plaintiffs' evidence and granting Defendants' motions for summary judgment as uncontroverted, did the district court find Plaintiffs out of compliance with local rules, the Federal Rules, or any court order.

A more recent Eighth Circuit opinion shows no erosion of these baseline concerns for fundamental fairness, as district courts continue to exercise their inherent authority to manage dockets and enforce local rules:

> . . . in invoking its inherent power, a court 'must comply with the mandates of due process.' *Chambers v. NASCO, Inc.*, 501 U.S. at 44-45 [111 S. Ct. 2123, 115 L.Ed.2d 27 (1991)]. Thus, before a district court may impose sanctions, the individual must receive notice that sanctions against her are being considered and an opportunity to be heard. [citations omitted]

*Plaintiffs' Baycol Steering Committee v. Bayer Corporation*, 419 F.3d 794 (8th Cir. 2005). Nevertheless, in this case, the Eighth Circuit chose to approve the district court's contravention of these basic requirements. It permitted the district court to ignore the well-established requirement of notice and an opportunity to cure what the court found deficient – a requirement demanded by both accepted

judicial practice and the Constitution. Instead, it permitted the district court to impose a death-knell sanction without notice of any kind.

At no time did the district court find any sanctionable conduct on the part of the litigants themselves. The district court's assessment of misconduct was laid solely at the feet of counsel, and the court made that fact clear in its award of monetary sanctions against counsel for precisely the same procedural noncompliance as stated in the order striking Plaintiffs' evidence. Pet. App. 153-60. Because the district court struck without notice, Plaintiffs had no knowledge of any problem with their cases or the actions of their attorney. The court's failure to provide notice and an opportunity to be heard deprived Plaintiffs even of the opportunity to seek advice of other counsel or ask the district court for leave to do so.

The district court assessed monetary penalties against Plaintiffs' counsel for perceived local rules violations. Additional sanctions against the litigants themselves, striking their defenses to summary judgment and eliminating their right to trial, were 'not related concretely to redressing the harm' of the attorney's misconduct and were "not supported by the facts as being necessary to deter the attorney in the future." *Baycol,* 419 F.3d at 808, *citing In re Kujawa*, 270 F.3d 578, 583-584 (8th Cir. 2001). The sanctions against the litigants were unwarranted under the circumstances and far exceeded the bounds of accepted judicial practice, as well as due process.

Inherent in all the above-cited opinions, even when they only discuss the relative propriety of the sanction imposed, is the deep concern of federal courts for protection of due process in the context of rules enforcement.

Thus, the sanctions issued in this case raise not only an important question that justifies an exercise of this Court's supervisory powers, they also raise a significant issue of due process rights that should be explored by this Court.

## II. THE EIGHTH CIRCUIT VIOLATED DUE PROCESS WHEN IT PERMITTED INTERPRETATION OF A LOCAL RULE TO ALLOW BOTH LIMITATION OF CONTRAVENING FACTS AND ELIMINATION OF HUNDREDS OF ADMITTED FACTS.

The Eighth Circuit affirmed the district court's finding that no properly supported record evidence existed to support Plaintiffs' claims. Making that finding required the district court to decide that Local Rule 56.1 permitted elimination of all material facts presented by Plaintiffs, even if they were admitted in whole or in part by one or both Defendants. The determination further rested on the district court's interpretation of Rule 56.1 as somehow limiting the overall number of facts permitted in a response to a summary judgment motion.

Local rules do not displace the Rule 56(c) obligation to consider the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," in determining whether "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See Celotex*, 477 U.S. at 324; *Burke v. Gould*, 286 F.3d 513, 521 (D.D.C. 2002). Neither the parties nor either lower court have identified any legal authority authorizing a district court to avoid looking at uncontroverted material facts by using Rule 56(c) to eliminate them from the record.

Nevertheless, the district court relied upon Local Rule 56.1 in refusing to consider some 600 statements of uncontroverted material evidence presented by Plaintiff. Local Rule 56.1 states that motions for summary judgment should contain "a concise statement" of separately numbered uncontroverted material facts with citation to the record. Conversely, an opposition responds to the movants' facts and is to provide "a concise listing" of separately numbered material facts "as to which the party contends a genuine issue exists."

Neither the Local Rules nor any prior judicial decision in the Western District or the Eighth Circuit establish a limitation on the total number of factual statements that may be submitted in support or opposition of summary judgment motions. Such a rule would be unworkable, as the number of facts necessary to support or avoid summary judgment depends largely upon the number of issues, complexity of issues, the number of witnesses, and the number of documents present in each case. Local Rule 56.1 does provide page limits, **exclusive of facts**, for briefing on summary judgment. But the district court granted the parties leave to file briefs of the length utilized, all of which were far in excess of those page limits.

Under Rule 11, Defendants were required to include within their motions critical deposition testimony and documentary evidence obtained in discovery, to the extent that evidence presented issues of material fact as to Plaintiffs' various claims.

> When a party has obtained knowledge through the course of discovery, or otherwise, that a material factual dispute exists and yet proceeds to file a summary judgment motion, in hopes that the opposing party will fail or be unable to meet

> its burden in responding to the motion, he defeats that purpose; and more importantly, violates the rules of procedure which govern the conduct of trial, specifically Rule 11.

*Goka v. Bobbitt*, 862 F.2d 646, 650 (7th Cir. 1988).

The record at the time of dismissal included depositions of more than 50 witnesses, with 7,781 pages of testimony; 39,000 pages of records produced by Defendants; and 117 affidavits. From that record, Defendants submitted 577 fact contentions, all of which supported their positions, and all of which omitted submission of any contravening evidence. As a result, Plaintiffs were required by *Celotex* and Rule 56 to present all of the discovery evidence which showed material questions of fact as to their various claims, so as to preclude summary judgment. They had to respond to every one of Defendants' 577 fact contentions, in separately numbered paragraphs, with reference to support in the record, and then present their own 948 factual contentions, similarly categorized, in order to demonstrate the existence of material controverted issues.

The district court responded in two ways. It castigated Plaintiffs for the length of their consolidated opposition and identified six paragraphs it believed misstated the record, were unsupported by competent evidence, or otherwise contravened Local Rule 56.1. It then struck all of Plaintiffs' factual submissions, including those that had been admitted in whole or in part by one or both of the Defendants.

The following are illustrative examples of evidence stricken without explanation or specific reason, as to Clark:

1. Multiple testimony that Clark's supervisors both had a long history of allegations of racial discrimination and disparate treatment of African-American employees;

2. Eyewitness testimony that Clark's supervisor said he was brought to Lenexa to terminate some of the older employees, including Clark;

3. Uncontroverted evidence that, four days after Clark was officially nominated as a candidate on the reform slate for the union, UPS terminated him, and that he was subsequently reinstated;

4. Eyewitness testimony that his supervisors stated that they would find a way to terminate Clark for failure to follow instructions;

5. Uncontroverted evidence that, the day after Clark became the first African-American to be elected to a position on the union board, he was permanently terminated for failure to follow instructions; and

6. Eyewitness testimony that Clark's supervisors bragged: "I told you we would get him."

Likewise, the following are illustrative examples of evidence stricken without explanation or specific reason, as to Jones:

1. Eyewitness testimony from a union steward, now a union officer, and from the Union Vice President that unauthorized sleeper teams were used to displace Jones' bid job; and

2. Eyewitness testimony that no evidence was presented at Jones' discharge hearing of this pattern of harassment

despite the admission by the Panel's Chairman it would have been considered.

These properly supported material facts, among hundreds of other properly supported material facts, were stricken because, in large part, the district court found that Plaintiffs presented too many facts. The district court never warned Plaintiffs it planned to interpret Local Rule 56.1 to restrict the amount of factual evidence Plaintiffs could present. There is no published opinion in the Western District that interprets Local Rule 56.1 as containing any limit on the number of concisely stated facts in either a motion for summary judgment or a response to such a motion.

While the district court could surely have stricken any fact statements determined to be in violation of the local rules or otherwise deficient, Local Rule 56.1 does not provide a basis for striking the hundreds of facts that were uncontroverted, nor does Rule 56.1 provide a basis to take such action in the absence of notice or an opportunity to cure whatever deficiencies the court might find.

Interpreting Local Rule 56.1 to permit striking uncontroverted material facts denies due process and violates Rule 56(c). Interpreting Local Rule 56.1 to permit striking material facts without prior notice and an opportunity to be heard denies due process. The district court's interpretation of Local Rule 56.1 is inconsistent with Rule 56, with this Court's holding in *Celotex*, and with the basic tenets of due process. That interpretation, if left standing, would unconstitutionally restrict a litigant's ability to present evidence and to avoid summary judgment.

## III. THE EIGHTH CIRCUIT'S DECISION IS IN CONFLICT WITH THOSE OF OTHER CIRCUITS, TO THE EXTENT IT AFFIRMED THE DISTRICT COURT'S SELECTIVE GLEANING OF THE RECORD FOR FACTS FAVORABLE TO MOVANTS, WHILE IGNORING DIRECT EVIDENCE OF DISCRIMINATION.

Even in a case where a movant's statement of facts is uncontroverted, summary judgment can only be granted after the district court undertakes a review of the whole record to ensure there is a legally sufficient basis for a grant of summary judgment. Where a movant "fail[s] to fulfill its initial burden" of supporting its uncontroverted material facts with admissible evidence, summary judgment must be denied, "even if no opposing evidentiary matter is presented, for the non-movant is not required to rebut an insufficient showing." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160 (1970). *See Vermont Teddy Bear Company, Inc. v. 1-800 Beargram Company,* 373 F.3d 241 (2d Cir. 2004) (reversing because undisputed facts failed to show moving party was entitled to judgment as a matter of law).

The Second Circuit has specifically held that a district court may not rely solely on the statement of undisputed facts contained in a motion for summary judgment, or on the movant's memorandum of law, but must satisfy itself that citation to evidence in the record supports the movant's assertions. *Giannullo v. City of New York*, 322 F.3d 139, 143 n.5 (2d Cir. 2003). A local rule permitting a court to deem facts uncontroverted does not absolve the movant of the burden to show it is entitled to judgment as a matter of law:

> the record does not support certain critical assertions in the defendant's Rule 56.1 statement on which the district court relied, with the result that, even though plaintiff's Rule 56.1 counterstatement failed to specifically controvert these assertions, the unsupported assertions must nonetheless be disregarded and the record independently reviewed.

*Id.* at 140. As a different court has found, "[a]llowing a Local Rule 56.1 statement to substitute for the admissibility requirement set forth in Fed.R.Civ.P. 56(e) 'would be tantamount to the tail wagging the dog.'" *Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 62, 73-74 (2d Cir. 2001), quoting *Rivera v. Nat'l R.R. Passenger Corp.*, 152 F.R.D. 479, 484 (S.D.N.Y. 1993).

Prior to the district court's orders on summary judgment, Plaintiffs filed a motion challenging significant misstatements of the record by Defendants in their motions, and claiming that many of Defendants' statements of fact were either not properly supported with competent admissible evidence, contradicted prior sworn testimony, or themselves presented questions of fact precluding summary judgment. The district court granted summary judgment without ruling on that motion. Instead, and in contravention of the rule expressed by the Second Circuit, the Eighth Circuit permitted the district court's grant of summary judgment in spite of examples in the record like the following of record evidence that should have precluded summary judgment:

1. UPS proffered declarations directly contradicting those witnesses' prior sworn testimony;

2. The district court accepted as true new affidavits of two witnesses whom the court previously found were improperly cued by counsel at deposition to feign a lack of understanding;

3. The district court accepted as true 108 changes to a witness' deposition, many of them on material matters, despite the clear rule material changes in testimony may not be accepted on summary judgment. *See Thorn v. Sundstrandt Aerospace Corp.*, 207 F.3d 383 (7th Cir. 2000); *Rios v. Welch*, 856 F. Supp. 1499, 1502 (D. Kan. 1994);

4. Defendants stated there was no record evidence that Jones had more seniority than the drivers who were working in the Lenexa yard on November 11, but their own witness, dispatcher Wetchensky testified to this exact fact;

5. Defendants stated that UPS managers/supervisors involved in Jones' discharge and decisions to cut his route were unaware of his involvement in the union election, but two witnesses testified to the contrary;

6. Defendants stated that Clark had no evidence that any UPS supervisor or manager had knowledge about his specific activities during the Union campaign, but Clark's supervisor testified to the contrary;

7. Defendants stated that Union agent Thompson did not attempt to remove Jones as steward, yet the union vice president testified as to his understanding to the contrary;

8. Defendants stated there was no evidence Thompson stopped speaking to Jones unless required by union business, but Thompson testified to the contrary;

9. Defendants stated there was no evidence from business agent Long that UPS managers complained Jones was difficult to work with as head steward, but that exact testimony is in the record; and

10. Defendants stated Jones could be removed by the union president as head feeder steward at any time with Board approval, yet both the union president and vice president testified removal could only follow an election of members or a finding of intentional malfeasance.

These limited examples demonstrate that Defendants' Rule 56.1 statements cannot support summary judgment, even if the district court permissibly struck Plaintiffs' responses thereto. Contrary to the rule stated by this Court, and contrary to the specific ruling of the Second Circuit in *Gianullo*, the district court failed to satisfy itself of the sufficiency of Defendants' facts, choosing either to simply take those facts at face value without determining whether evidence in the record supported the assertions, or after ignoring competent record evidence that controverts material assertions and thus precludes summary judgment.

Finally, in what appears to be an effort to bolster Defendants' position on summary judgment, the district court improperly took it upon itself to peruse the very evidence it had stricken to selectively glean evidence favorable to a grant of summary judgment. For example, in its orders on summary judgment, the district court evaluated and discounted the credibility of the testimony of former UPS supervisor Gary Jones, that McMullin stated he was transferred to Lenexa to terminate "older employees," including Clark. This testimony was not

contained in Defendants' Rule 56.1 statements and is only found in Plaintiffs' facts, which were stricken.

Similarly, the district court considered, but improperly disregarded, some of Jones' evidence of age discrimination, none of which is contained in Defendants' motion. The district court also considered evidence of race discrimination not offered in the moving papers of either Defendant, including widespread racial comments in the workplace. The district court considered this evidence in analyzing Clark's racial harassment claim, but blatantly ignored this and substantial other evidence in evaluating Clark's wrongful termination claim.

This case creates a split in the Circuits as to the appropriate scope of the record when a court considers evidence not contained in the movants' summary judgment motion. The Seventh Circuit has concluded that when a district court considers evidence beyond the summary judgment motions, the record on appeal includes all evidence submitted to the district court:

> If a district court relies on either local rule or Federal Rule 56(c) to limit the record for the purposes of summary judgment to the moving party's undisputed facts, then the court cannot look beyond the moving party's motion and selectively incorporate legal theories or facts that support the motion. If the court elects to rely on legal arguments and evidence not incorporated in, or submitted with, the summary judgment motion, the court is obligated to consider the entire record, 'to ensure that the record reveals no issue of material fact.'

*Nabozny v. Podlesny*, 92 F.3d 446, 450-51 (7th Cir. 1996), quoting *Brown v. U.S.*, 976 F.2d 1104, 1110 (7th Cir. 1992).

The Second Circuit demands a similar application of Rule 56. That court found error when a district court searched piecemeal through the record, ignoring substantial evidence that raise questions of material facts on all claims:

> In determining the appropriateness of summary judgment, the court should not consider the record solely in piecemeal fashion, giving credence to innocent explanations for individual strands of evidence, for a jury in assessing whether there was impermissible discrimination and whether the defendant's proffered explanation is a pretext for such discrimination, would be entitled to view the evidence as a whole.

*Howley v. Town of Stratford*, 217 F.3d 141, 151 (2d Cir. 2000).

The application of Rule 56 by the Second Circuit and the Seventh Circuit comports with Due Process. Neither the Constitution nor the Federal Rules permit a trial court to review an entire record and then selectively choose evidence favorable to one side, at the expense of the other. That unacceptable form of review is exactly what happened here; yet the Eighth Circuit affirmed the district court's ability to conduct a piecemeal review of the record and selectively glean facts supporting summary judgment, while ignoring substantial direct evidence of discrimination, retaliation and unfair representation.

Certification is necessary to address this conflict between the circuits regarding the scope of the record on summary judgment and the court's obligation to independently review the record.

## CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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February 2007

461 F.3d 982

**United States Court of Appeals**
**FOR THE EIGHTH CIRCUIT**

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Nos. 05-2202/2205

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| Stephen E. Jones, | * | |
| | * | |
| Appellant, | * | |
| Doyle Clark, | * | |
| | * | |
| Appellant, | * | Appeals from the United |
| | * | States District Court for |
| v. | * | the Western District of |
| United Parcel Service, Inc.; | * | Missouri. |
| Local 41 of the International | * | |
| Brotherhood of Teamsters, | * | |
| | * | |
| Appellees. | * | |

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Submitted: March 13, 2006
Filed: August 22, 2006 **(Corrected 9/19/06)**

(Filed November 27, 2006)

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Before COLLOTON, HEANEY, and GRUENDER, Circuit Judges.

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COLLOTON, Circuit Judge.

Plaintiffs Stephen Jones and Doyle Clark appeal the district court's[1] grant of summary judgment to defendants United Parcel Service ("UPS") and Local 41 of the International Brotherhood of Teamsters ("Local 41") on their various claims of employment discrimination and breach of the duty of fair representation. We affirm.

## I.

Jones and Clark were employees at a UPS facility in Lenexa, Kansas. Jones was a tractor-trailer driver with a daily route (a "bid route") between Lenexa and Wichita, Kansas. Clark was a package sorter during the morning shift and a hazardous materials ("haz-mat") responder during the day shift. Jones and Clark also were members of Local 41, the union which represented Lenexa facility employees.

In a previous disciplinary action that is not directly at issue in this case, UPS terminated Clark for abandoning his job on September 18, 2002. Clark had arrived early to his shift, and a supervisor invited him to perform overtime work unloading trailers until his package sorter shift began fifteen minutes later. Clark insisted on sorting immediately, and when the supervisor denied Clark's request, he left the facility. Clark returned six hours later with Jones, acting in his union representative capacity, but UPS discharged Clark. Clark filed a grievance that day, and along with union representatives, he met with UPS management. He was reinstated but sanctioned with a two-day suspension.

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[1] The Honorable Gary A. Fenner, United States District Judge for the Western District of Missouri.

On October 16, 2002, UPS terminated Clark again. That morning, Clark's supervisors assigned Clark to work as the morning shift haz-mat responder. These duties required Clark to carry and use a two-way radio. One of Clark's supervisors instructed Clark on how to use the radio, but Clark failed to answer any calls despite repeated attempts by supervisors and managers to call him, and he responded to spills only when supervisors approached him in person. Clark's supervisors asked to meet with Clark and union representative Greg Toplikar at the end of Clark's shift. Jeff Johnson, a Lenexa facility morning shift manager, provided Clark with an opportunity to explain why he refused to use the radio, but Clark became unresponsive and belligerent. Johnson terminated Clark because he refused to follow instructions regarding use of the radio and "was grossly insubordinate in their meeting." (R. Doc. No. 320 at xxvi).

Beginning in late-July 2002, UPS management cut Jones's bid route on twelve or thirteen occasions, and Jones filed grievances regarding many of these cuts. Around the same time, Jones, as union steward acting on behalf of other UPS drivers and on his own behalf, filed several grievances that UPS had routinely used "sleeper teams" to haul loads assigned to Lenexa facility drivers in violation of the collective bargaining agreement. A "sleeper team" is a "two-person crew[ ] that operate[s] over-the-road tractor trailers," and "take[s] turns driving . . . , thus, keep[ing] the tractor on the road longer than could a single driver." (R. Doc. No. 312 at 39).

UPS terminated Jones on November 12, 2002, for job abandonment. The previous night, Jones had arrived at work to drive his bid route, but Lavell White, a manager, and Scott Wetschensky, a dispatch supervisor, cut Jones's

route. They did so because there were insufficient packages to be delivered on Jones's normal route, and because they needed Jones to drive a different route. Jones told Wetschensky that he planned to go home because his route was cut, to which Wetschensky responded that leaving would be considered "job abandonment." Jones expressed to Wetschensky his view that because his route had been cut, leaving would not be job abandonment, and Jones returned home rather than drive the alternative route. UPS management decided to terminate Jones for abandoning his job, and White executed the discharge the next day.

Local 41 business agents file grievances on behalf of UPS employees who believe they have been "disciplined unfairly and in violation of the collective bargaining agreement." (R. Doc. No. 312 at 4). Agents represent union members against UPS at local hearings, during which agents meet with UPS representatives to review the circumstances of the incident leading to the grievance and to discuss settlement of the dispute. If a local hearing is unsuccessful in resolving a grievance, then the agents continue to represent the union members at the next level of review, before a "Mo-Kan panel." The Mo-Kan panels are composed of an equal number of union and UPS representatives selected by the co-chairs of a Missouri-Kansas Joint Area Grievance Committee ("Mo-Kan Committee") that is created by the collective bargaining agreement to oversee the resolution of grievances. UPS and Local 41 each appoints a co-chair of the Mo-Kan Committee, and these co-chairs select committee members to sit on Mo-Kan panels and hear specific grievances.

Business agent Clint Long filed grievances on behalf of Jones regarding Jones's complaints concerning the cutting of his bid route and the use of sleeper teams, as

well as his November 12 termination. At Jones's local grievance hearing regarding his termination, Long requested that Jones be reinstated and presented evidence on Jones's behalf. Agents Toplikar and John Thompson similarly represented Clark in Clark's grievances for his September 18 and October 16 terminations. UPS upheld Jones's November 12 termination and Clark's October 16 termination at their respective local hearings, and Local 41 appealed these decisions to Mo-Kan hearing panels. The Mo-Kan panels upheld UPS's discharges of Jones and Clark. Each plaintiff stated at the end of his Mo-Kan hearing that Local 41 business agents had provided adequate representation.

Jones and Clark then filed this action, alleging that "UPS, with the knowledge, support[,] or at the suggestion of the Union, terminated [them] in violation of the collective bargaining agreement with the Union and for improper [ ]or discriminatory reasons." (R. Doc. No. 28 at 1). According to the complaint, Jones and Clark were politically active in Local 41 and opposed to Local 41's existing leadership. In 2002, Jones became the campaign manager for a slate of candidates that was nominated to run against the incumbents, and Clark ran on the opposition slate's ticket as the nominee for recording secretary. The complaint alleged that Phil Young, who had recently resigned as the Local 41 president, was outraged by the issues and accusations raised by the opposition slate, and vowed that future candidates would be prevented from raising such accusations. Clark was elected recording secretary on October 15, 2002.

Both plaintiffs raised "hybrid" claims against Local 41 and UPS, pursuant to § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, alleging a breach

of the union's duty of fair representation and a breach of the collective bargaining agreement by UPS. They also asserted claims against Local 41 under § 101 of the Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 411, alleging a breach of their statutory rights as union members.

Specifically, Jones alleged that beginning in July 2002, UPS began eliminating his bid route from Lenexa to Wichita at least once per week, and that on November 11, UPS again cut his route and asked him to perform non-emergency alternative work instead. According to the complaint, Jones elected to go home, and although his supervisor made no objection, Jones was summarily terminated the next morning for "job abandonment." Clark alleged that on the morning of October 16, 2002, he was assigned to work as a haz-mat responder. He alleged that he was not provided with a belt clip or other holder for his two-way radio, and that he did not want to put the radio in his pocket for fear of suffering discipline. Clark alleged that UPS supervisors later confronted him for refusing to put the radio in his pocket, and that Clark explained he would not put anything in his pocket that did not belong to him. The complaint alleges that Clark was then immediately terminated for insubordination.

Plaintiffs alleged that after the 2002 union election, Local 41's leadership began "a campaign of retaliation against the [opposition] slate of candidates and Jones." (R. Doc. No. 28 at 23-24). They asserted that the union failed adequately to investigate, pursue, or otherwise process grievances on behalf of Jones and Clark. They further alleged that the Mo-Kan hearing panels summarily upheld their terminations, (*Id.* at 13, 17), and that "the Mo-Kan panel members were appointed or influenced by Union

leadership hostile to [plaintiffs], including Phil Young."[2] (*Id.* at 13; *see also id.* at 17).

Alternatively, Jones alleged that UPS terminated him due to his age, in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 623(a)(1), 631(a), the Kansas Age Discrimination in Employment Act, Kan. Stat. Ann. § 44-1111 *et seq.*, and the Missouri Human Rights Act, Mo. Rev. Stat. § 213.010 *et seq.*, or in retaliation for blowing the whistle on alleged UPS record-keeping improprieties. Clark alternatively alleged that UPS terminated him due to age discrimination in violation of the ADEA, or racial discrimination and harassment, in violation of Title VII. 42 U.S.C. § 2000e-2(a)(1).

Local 41 filed a motion for summary judgment, and UPS filed two, one against Jones and one against Clark, and plaintiffs filed a joint response to the three motions, a document that was 480 pages long. According to the district court, "[m]uch of the information contained in [plaintiffs'] mendacious recounting of 'fact' [in their response] is either misstated, inadmissible, or wholly unsupported by the record." The court provided six examples of errors that it believed were rampant throughout plaintiffs' brief, and determined that the brief did not comply with the concision and specificity requirements of Local Rule 56.1. The court stated that the plaintiffs' strategy relied "upon neither the trustworthiness of the factual assertions nor the quality of the arguments, but upon the

[2] Plaintiffs alleged in their complaint that "as part of [its] campaign of retaliation[,] the Union encouraged and/or pressured UPS into firing Jones and Clark for pretextual reasons." (R. Doc. No. 28 at 23-24). On appeal, they cite no evidence and make no argument in support of this assertion.

sheer volume of material impressed upon the opposing parties and the Court." Plaintiffs' brief, in the view of the district court, "represents a form of litigation by attrition, wherein the practitioner's intent was to force the opposition either to yield to its position or be crushed under a great weight of misstated factual assertions and drowned in a sea of bombast." The court ruled that both plaintiffs' statement of controverted facts and plaintiffs' response to defendants' uncontroverted facts "are disregarded as noncompliant with the Local Rules and the Federal Rules of Civil procedure and, as a result, all factual assertions by Defendants are deemed as admitted."

Taking each of the defendants' statements of uncontroverted facts as admitted, the court held that plaintiffs could not overcome a motion for summary judgment on their hybrid LMRA § 301 wrongful termination claims. The court thought their arguments alleging Local 41 did not adequately represent them were "incredibly unpersuasive," and "wholly disingenuous," since each plaintiff admitted at his respective Mo-Kan hearing that he was satisfied with the representation provided by Local 41 business agents. Because plaintiffs could not show that Local 41 breached its duties of fair representation, their claims against UPS for breach of the collective bargaining agreement necessarily failed as a matter of law. *See Hines v. Anchor Motor Freight, Inc.,* 424 U.S. 554, 570-71 (1976). The court also held that Clark's hybrid § 301 claim for his September 18 termination was time-barred. *See DelCostello v. Int'l Bhd. of Teamsters,* 462 U.S. 151, 172 (1983) (six-month limitations period). With respect to Jones's hybrid § 301 claims involving UPS cutting his bid route and using sleeper teams to haul his loads, the court concluded that Jones did not establish a triable issue of

fact on whether Local 41 breached its duty of fair representation. In addition, the court granted summary judgment to defendants on plaintiffs' various LMRDA claims, for want of evidentiary support and because the LMRDA does not provide a remedy for many of the injuries that plaintiffs asserted.

The court also dismissed the various discrimination clams [sic] alleged by the plaintiffs. The court found that neither plaintiff provided sufficient "direct evidence" of age or race discrimination to create a submissible case, *see Griffith v. City of Des Moines,* 387 F.3d 733, 735-36 (8th Cir. 2004), and that plaintiffs also failed to establish a *prima facie* case on those claims, as well as on Jones's whistle-blower retaliation claim, under the burden-shifting analysis of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-04 (1973).

II.

We first consider the district court's determination to disregard plaintiffs' statement of controverted facts and responses to defendants' statements of uncontroverted facts contained within their 480-page filing. We review that decision for abuse of discretion. *Northwest Bank & Trust Co. v. First Ill. Nat'l Bank,* 354 F.3d 721, 725 (8th Cir. 2003).

Local Rule 56.1 places size and content limitations on a non-movant's response to a summary judgment motion. W.D. Mo. R. 56.1(a). The rule provides that "[s]uggestions in opposition to a motion for summary judgment shall begin with a section that contains a concise listing of material facts as to which the party contends a genuine issue exists." *Id.* It further directs that "[e]ach fact in

dispute shall be set forth in a separate paragraph, shall refer specifically to those portions of the record upon which the opposing party relies, and, if applicable, shall state the paragraph number in movant's listing of facts that is disputed." *Id.* The purpose of the rule is to distill to a manageable volume the matters that must be reviewed by a court undertaking to decide whether a genuine issue of fact exists for trial. It is designed "to prevent a district court from engaging in the proverbial search for a needle in the haystack." *Northwest Bank,* 354 F.3d at 725. With both the movant's list of uncontroverted facts and the non-movant's list controverted facts and accompanying cross-references, including specific citations to the record, the court can focus its review on materials that may demonstrate a disputed issue for trial.

Notwithstanding this rule, plaintiffs filed a 480-page response to the defendants' three motions for summary judgment, which contained 948 statements of "controverted facts" spanning 168 pages, 179 pages of responses to defendants' statements of uncontroverted facts (included many that were not even disputed), and 132 pages of legal argument. It hardly need be stated that this pleading did not contain a "concise" listing of material facts, as required by Local Rule 56.1(a).

More significantly, plaintiffs' brief suffers from misleading and inaccurate statements, and often omits the citations to the record required by the local rule. The district court correctly listed three examples where the brief materially misstated the record, (R. Doc. No. 373, Pls.' Statement of Controverted Facts, ¶¶ 243, 246, Pls.' Resp. to Local 41's Statement of Uncontroverted Facts, ¶ 90), and we find several more where the record material cited provides inadequate support for the asserted proposition.

(R. Doc. No. 373, Pls.' Statement of Controverted Facts, ¶¶ 17, 29, 39, 51, 68, 69, 117, 121).

The district court also correctly cited three examples of plaintiffs' fact statements and responses that contained citation errors. (R. Doc. No. 373, Pls.' Statement of Controverted Facts, ¶ 228, Pls.' Resp. to Local 41's Statement of Uncontroverted Facts, ¶ 79, Pls.' Resp. to UPS's (Clark) Statement of Uncontroverted Facts, ¶ 50). Again, we have found many more. In some statements, the asserted fact was not supported by any citation whatsoever. (R. Doc. No. 373, Pls' Resp. to Local 41's Statement of Uncontroverted Facts, ¶¶ 8, 9, 22, 36, 38, 47, 102, 111, 199, Pls' Resp. to UPS's (Jones) Statement of Uncontroverted Facts, ¶¶ 24, 131). Many other paragraphs simply cross-referenced statements of controverted facts or responses to defendants' uncontroverted facts, in violation of the local rule's requirement that the controverted fact "refer specifically to those portions of the *record* upon which the opposing party relies." (*See* R. Doc. No. 373, Pls.' Resp. to Local 41's Statement of Uncontroverted Facts, ¶¶ 20, 23, 31, 91, 106, Pls.' Resp. to UPS's (Clark) Statement of Uncontroverted Facts, ¶¶ 27, 35, 39, 40, 46, 48, 49, 100-03, 107, Pls.' Resp. to UPS's (Jones) Statement of Uncontroverted Facts, ¶¶ 35, 37, 120-123, 163). In some instances, even the cross-referenced materials are irrelevant to the proposition asserted. Other purported statements of controverted fact instead consist of impermissible conclusions or legal argument. (R. Doc. No. 373, Pls.' Resp. to Local 41's Statement of Uncontroverted Facts, ¶¶ 119, 121, 122, Pls.' Resp. to UPS's (Clark) Statement of Uncontroverted Facts, ¶¶ 7, 17, 23, 28, Pls.' Resp. to UPS's (Jones) Statement of Uncontroverted Facts, ¶¶ 34, 41, 43, 51, 71, 77, 88).

This case thus presents a scenario similar to that in *Northwest Bank,* where we held that a district court did not abuse its discretion by deeming the movant's statement of material facts admitted as a sanction for the non-movant's failure to comply with analogous Local Rules in the Northern and Southern Districts of Iowa. 354 F.3d at 724-25; *see* N.D. Iowa R. 56.1; S.D. Iowa R. 56.1. In that case, the non-movant's voluminous filings, filled with conclusory allegations and legal argument, did not contain the concision and specificity commanded by the Local Rules. *Northwest Bank,* 354 F.3d at 725; *see also Waldridge v. Am. Hoechst Corp.,* 24 F.3d 918, 922 (7th Cir. 1994).

We likewise conclude the district court did not abuse its discretion in determining that plaintiffs' statement of controverted facts and response to defendants' uncontroverted facts violated Local Rule 56.1, and in disregarding them as a sanction. As a consequence, the district court properly deemed defendants' statements admitted. "All facts set forth in the statement of the movant shall be deemed admitted for the purposes of summary judgment unless specifically controverted by the opposing party," W.D. Mo. R. 56.1(a), and the plaintiffs failed to provide a pleading in accordance with the rules that controverted any of the movants' facts.

Plaintiffs argue that the district court was required to give specific notice that they violated the local rule before disregarding their response. We believe the local rule itself provides adequate notice of the requirements to which a party must adhere. The district court is not required to study laboriously a 480-page pleading and the record materials cited therein to determine that it is non-compliant with the rules, and then afford the party another

opportunity to file a pleading that complies. This is not a case of a district court nit-picking a party for technical violations of a local rule. The non-compliance was substantial, and it was not an abuse of discretion for the district court to disregard the pleading without further give-and-take with the plaintiffs.

III.

Having concluded that the district court properly disregarded factual portions of plaintiffs' response, we consider *de novo* the court's determination to grant summary judgment on the remaining record. *See Johnson v. Ready Mixed Concrete Co.*, 424 F.3d 806, 810 (8th Cir. 2005) (standard of review).

A.

Plaintiffs contend that summary judgment was inappropriate on Jones's age discrimination and whistle-blowing retaliation claims, and on Clark's claims of age and race discrimination. Because we agree with the district court that neither plaintiff has introduced strong evidence showing a specific link between an alleged discriminatory animus and the challenged decisions, plaintiffs' claims are analyzed under the burden-shifting framework set forth in *McDonnell Douglas*, 411 U.S. at 802-04; *see Griffith*, 387 F.3d at 735-36. According to UPS, it "terminated Clark for insubordination and failure to follow instructions." Similarly, UPS "terminated Jones for job abandonment after he refused to work as instructed on November 11, 2002." These are legitimate, non-discriminatory explanations. *See Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1135 (8th Cir. 1999)

(en banc); *Putman v. Unity Health Sys.*, 348 F.3d 732, 736 (8th Cir. 2003).

Because UPS fully developed the record for summary judgment, providing legitimate, non-discriminatory, non-retaliatory reasons for terminating plaintiffs, we may turn directly to the ultimate question of whether UPS engaged in intentional discrimination. *Ready Mixed,* 424 F.3d at 810; *see U.S. Postal Serv. Bd. of Governors v. Aikens,* 460 U.S. 711, 715 (1983). Whereas plaintiffs need only make a minimal showing to establish the *prima facie* case, *see Sprenger v. Fed. Home Loan Bank of Des Moines,* 253 F.3d 1106, 1111 (8th Cir. 2001), more substantial evidence of discrimination is required to prove pretext, because evidence of pretext is viewed in the light of UPS's legitimate, non-discriminatory explanation. *Id.* To succeed at this stage of the *McDonnell Douglas* analysis, plaintiffs must prove that the prohibited reason was a determinative factor in UPS's decision to terminate. *Cronquist v. City of Minneapolis,* 237 F.3d 920, 926 (8th Cir. 2001); *see also Hazen Paper Co. v. Biggins,* 507 U.S. 604, 610 (1993).

The ADEA prohibits employers from discharging employees on account of age if they are older than forty years, 29 U.S.C. §§ 623(a)(1), 631(a), and Title VII prohibits discrimination on account of race. 42 U.S.C. § 2000e-2(a)(1). Clark, who was in his early 40s at the time of his termination, asserts that his age and race had determinative effect on UPS's decisions to terminate him, but no evidence in the remaining record supports his assertions. Rather, the evidence supports UPS's legitimate, non-discriminatory justification for terminating Clark. Clark initially refused to carry the two-way radio provided by his managers, and he failed to respond to at least six calls. Although Clark asserts that his radio malfunctioned

throughout his shift, the record indisputedly supports the conclusion that his radio operated properly. (R. Doc. No. 320 at xxiii-xxiv). Furthermore, Clark was insubordinate when he met with management after completing his shift. The record is devoid of any evidence suggesting that race or age had a determinative effect on UPS's decision to terminate Clark.

Clark also alleges that UPS subjected him to a racially hostile work environment, in violation of Title VII. 42 U.S.C. § 2000e-2(a)(1); *see Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). A plaintiff alleging an unlawfully hostile work environment must show a workplace "permeated with discriminatory intimidation, ridicule, and insult" that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris,* 510 U.S. at 21 (internal quotations omitted). To be actionable, the environment must objectively be hostile or abusive, and the employee must subjectively perceive it as such. *Id.* at 21-22. Clark has presented no evidence that he subjectively perceived the Lenexa facility as hostile. The record shows that Clark never filed any grievances about racial harassment while at the Lenexa facility. And there is no evidence of record that UPS personnel made racially derogatory comments in Clark's presence. *See Williams v. ConAgra Poultry Co.,* 378 F.3d 790, 795 (8th Cir. 2004).

Jones, who was in his late 40s at the time he was terminated, argues that age was the but-for cause of his termination, in violation of the ADEA, 29 U.S.C. §§ 623(a)(1), 631(a), the Kansas Age Discrimination in Employment Act, Kan. Stat. Ann. § 44-1110 *et seq.*, and the Missouri Human Rights Act. Mo. Rev. Stat. § 213.010 *et seq.* Age discrimination claims under the MHRA and

KADEA proceed under the *McDonnell Douglas* framework when a federal ADEA claim alleged in the same case proceeds in that manner. *Fast v. S. Union Co., Inc.,* 149 F.3d 885, 889 (8th Cir. 1998); *Elza v. Koch Indus., Inc.,* 16 F. Supp. 2d 1334, 1340 (D. Kan. 1998).

Jones argues that UPS's stated reasons for his termination were a pretext for age discrimination. He argues that other feeder drivers committed similar infractions by refusing to drive alternative routes, but were not disciplined, and that this differential treatment supports an inference of age discrimination. There is no evidence, however, that drivers who were assigned to drive an alternative route, and then refused to work, were allowed to pursue that course without discipline. Similarly, Jones alleges that numerous other feeder drivers who engaged in more egregious misconduct had been reinstated, but again, there is no evidence that other drivers were disciplined differently for abandoning their jobs. *See Cherry v. Ritenour Sch. Dist.,* 361 F.3d 474, 479 (8th Cir. 2004).

Finally, Jones alleges that he was the only driver to have his bid route cut more than a couple of times in 2002. That assertion itself implies that the other members of his protected class – all of the company's other drivers over the age of forty – were not treated differently than younger drivers, *see Harris v. Hays,* 452 F.3d 714, 718-19 (8th Cir. 2006), and is consistent with evidence that Lenexa facility drivers were treated the same regardless of age. (R. Doc. No. 321 at xx). The evidence is clear, moreover, that Jones was not similarly situated to most other feeder drivers at the Lenexa facility. His bid route was the last of six hauls driven from Lenexa to Wichita each day, and his route was commonly cut on Fridays for reasons peculiar to his route – volume tended to be lower, and

some of the loads that would have been assigned to Jones to haul on Friday evening were not due in Wichita until Sunday or Monday.

Jones's Kansas state law whistleblower retaliation claim also is analyzed under the *McDonnell Douglas* framework. *See Boe v. AlliedSignal, Inc.*, 131 F. Supp. 2d 1197, 1203 (D. Kan. 2001). To allege an actionable whistleblower retaliatory discharge claim in Kansas, the employee must establish that "the alleged irregularities amounted to violations of rules, regulations, or the law pertaining to public health, safety, and the general welfare." *Herman v. W. Fin. Corp.*, 869 P.2d 696, 704 (Kan. 1994) (internal quotations and citations omitted). Even assuming for the sake of argument that retaliatory animus for Jones's report of record-keeping irregularities was a determinative factor in UPS's decision to terminate him, Jones has provided no evidence that these irregularities amounted to violations of public health and safety laws or regulations. In fact, the record evidence is undisputed that the records Jones alleges UPS falsified are maintained exclusively for UPS internal purposes.

B.

Plaintiffs also allege that UPS breached its collective bargaining agreement with Local 41, and that Local 41 breached its duties of fair representation owed to the plaintiffs, in violation of § 301 of the LMRA. They both claim that UPS violated the contract by terminating them based on age or in retaliation for their union activities, and Clark also alleges that race motivated UPS. They further assert that Local 41 agents inadequately represented

plaintiffs in their wrongful termination grievances. Additionally, Jones alleges that Local 41 failed to represent adequately his claims that UPS violated the agreement by routinely cutting his bid route, and by using sleeper teams to haul packages that Jones otherwise would have been responsible to carry.[3]

"Section 301 contemplates suits by and against individual employees as well as between unions and employers," and "encompass[es] those seeking to vindicate 'uniquely personal' rights of employees such as wages, hours, overtime pay, and wrongful discharge." *Hines,* 424 U.S. at 562. As the exclusive bargaining agent in the negotiation and administration of a collective bargaining agreement, the union assumes the responsibility and duty of fair representation for all of its members. *Humphery v. Moore,* 375 U.S. 335, 342 (1964). Section 301 thus permits an action against the union for breach of its duty of fair representation, and an action against the employer for breach of the collective bargaining agreement. A party seeking to recover on a "hybrid" § 301 claim against the employer must prove both that the employer violated the collective bargaining agreement and that the union breached its duty of fair representation, assuming the employee has exhausted his contractual grievance remedies. *Vaca v. Sipes,* 386 U.S. 171, 186-87 (1967); *Waldron v. Boeing Co.,* 388 F.3d 591, 594 (8th Cir. 2004). A union breaches its duty of fair representation only when its conduct toward a member is "arbitrary, discriminatory, or

[3] Clark alleges that Local 41 failed to represent him adequately in his wrongful termination claim arising from his September 18 termination, but the district court correctly concluded this claim was time-barred. *See DelCostello,* 462 U.S. at 172.

in bad faith," *Vaca,* 386 U.S. at 190; *Buford v. Runyon,* 160 F.3d 1199, 1202 (8th Cir. 1998), or so unreasonable as to be "irrational." *Air Line Pilots Ass'n, Int'l v. O'Neill,* 499 U.S. 65, 78 (1991). "Mere negligence, poor judgment, or ineptitude by a union is insufficient to establish a breach of the duty of fair representation." *Buford,* 160 F.3d at 1202.

We need not decide whether UPS violated the collective bargaining agreement by terminating Jones or Clark out of a retaliatory or discriminatory motive, because plaintiffs on this record have not provided sufficient evidence to generate genuine issues of fact that Local 41 breached its duties of fair representation. Plaintiffs alleged that Local 41's investigations of each discharge were so inadequate as to "actually taint [] the grievance process." Yet at Clark's Mo-Kan panel hearing, Local 41 business agent Toplikar testified on Clark's behalf that the radio Clark was given did not work properly. Agent Thompson argued that Clark responded to all spills of which he was made aware, and that management "twisted" Clark's responses in his post-shift meeting into insubordination. Clark also testified on his own behalf.

Similarly, agent Long represented Jones at his Mo-Kan hearing after several phone conversations and a thirty-minute meeting between the two the morning of the hearing. Prior to the hearing, Long spoke with three drivers whose testimony Jones considered instrumental to his success, and Long researched a case Jones thought may have had precedential value. Long presented the statement of a driver who had been given the option of going home when his route was cut, and Long stated that Jones had a 28-year career at UPS without a significant disciplinary history. Jones also testified on his own behalf.

Union representatives are not lawyers and are not held to the same standards in presenting cases as attorneys. *Buford,* 160 F.3d at 1203. We have no difficulty concluding that Local 41's representation was not in breach of its duties. Indeed, Jones and Clark each stated to their respective Mo-Kan panels that Local 41 afforded them adequate representation.

Plaintiffs also suggest that UPS management conspired with Local 41 executive board members to retaliate against plaintiffs, that the Local 41 executive board prevented the union's business agents from fully performing their jobs, and that the Mo-Kan panel predetermined Jones's case and failed to give him a proper hearing. They cite the temporal proximity between the terminations and Clark's election as recording secretary on the slate opposing Local 41's incumbent president, their long records of service to UPS spanning over twenty years, and what they view as terminations for relatively minor misconduct. Clark, of course, had been disciplined once before for job abandonment, so it is difficult to view his second infraction as anything approaching *de minimis.*

In any event, what is missing from the record – disregarding the plaintiffs' non-compliant response to the motions for summary judgment – is any evidence that Local 41 did anything "arbitrary" or "irrational," or conspired with UPS in executing an alleged retaliatory scheme. Under the LMRA, plaintiffs are obliged to establish *both* that UPS retaliated and that Local 41 breached its duties of fair representation. *See Vaca,* 386 U.S. at 186-87. There is insufficient evidence to show that the business agents performed inadequately in representing Jones and Clark. The union membership on the Mo-Kan panel was drawn from Teamsters units other than Local 41, (R.

Doc. No. 312 at 19, 32), and there is no evidence of record that the Mo-Kan members were influenced by the leadership of Local 41 to retaliate against Jones and Clark, or that the Mo-Kan panel members otherwise carried out their duties in bad faith. The mere fact that the leadership of Local 41 was opposed to Clark in a union election is insufficient to support an inference that Mo-Kan panel members, drawn from different Teamsters units, acted in bad faith when considering the company's disciplinary action against Jones and Clark.

Jones's claims concerning elimination of his bid route and the use of sleeper teams similarly suffer from a lack of record support. Jones argues that Local 41 failed to investigate, postponed presenting the grievances to the Mo-Kan panel, and erred by not consolidating these grievances with his termination grievance. At the local hearing for Jones's first bid route elimination grievance, however, Long negotiated with UPS management to have Jones drive empty trailers from Wichita to Lenexa, and Jones agreed that this was a satisfactory settlement. Jones's grievances for subsequent cuts could not be resolved locally, and Long prepared to argue Jones's grievances before the Mo-Kan panel. Neither Long nor Jones could find any evidence that Jones's regular route was handled by drivers with less seniority, in violation of the collective bargaining agreement, and Long postponed presenting Jones's case in the hopes of discovering such evidence. Long withdrew the grievances in January 2003, because he had not discovered the evidence he sought, and because the Mo-Kan panel had already upheld Jones's November 12 termination. An individual employee does not have an absolute right to have his grievance taken to arbitration, *see Vaca,* 386 U.S. at 191, and Long's decisions

about the handling of these grievances do not support a claim that Local 41 breached its duty of fair representation.

Similarly, no evidence supports Jones's assertion that Local 41 acted in an arbitrary or discriminatory manner in pursuing his sleeper team grievances. Pursuant to the collective bargaining agreement, a joint committee comprised of Teamster and UPS representatives approves the use of sleeper team routes, including the route that was the subject of Jones's complaints. Jones does not argue that the joint committee approved a particular sleeper team route in violation of the collective bargaining agreement, but rather that UPS violated the agreement by using an approved team to haul packages that Jones otherwise would have been responsible to haul. Long presented Jones's grievance to the Mo-Kan panel, and was told at the hearing that the joint committee overseeing sleeper teams had jurisdiction to resolve the dispute. A UPS panel member also explained that if sleeper teams did not haul the cargo in question, then it would be hauled by train, not by Jones. In light of this information, and because the joint committee already had approved the sleeper team route, Long decided not to docket Jones's sleeper team grievances with the joint committee overseeing sleeper teams. Long's decision does not support a claim that Local 41 breached its duty of fair representation.

C.

Finally, plaintiffs allege a variety of breaches by Local 41 of the LMRDA. Title I of the LMRDA, the union workers' "Bill of Rights," protects the rights of union members to vote and participate in union decisions, insulated from

improper disciplinary action. 29 U.S.C. § 411(a); *Bradley v. Am. Postal Workers Union, AFL-CIO,* 962 F.2d 800, 801 (8th Cir. 1992); *see also Wirtz v. Hotel, Motel & Club Employees Union, Local 6,* 391 U.S. 492, 497-98 (1968).

Plaintiffs claim that Local 41 deliberately undermined their grievances challenging the terminations. The district court was correct to conclude that these claims essentially contain the substance of plaintiffs' § 301 claims against Local 41. Because plaintiffs were unable to establish that Local 41 breached its duties of fair representation, the claims involving that representation raised under § 101 of the LMRDA also fail.[4] Plaintiffs also allege that Local 41 violated the LMRDA by failing to find them alternative employment so that they could retain their union membership. They point to nothing in the text of the LMRDA or any case law, however, supporting the proposition that Local 41 had an affirmative duty under the statute to assist plaintiffs in securing new employment so that they could maintain their union membership.

Clark further alleges that Local 41 violated the LMRDA by trying to expel him for failing to pay dues. The LMRDA, however, clearly contemplates that a union may fine, suspend, expel, or otherwise discipline a member for nonpayment of dues. 29 U.S.C. § 411(a)(5). Moreover, an LMRDA claim is only actionable when the member demonstrates a direct interference with his vested rights, *see*

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[4] Clark's claim that Local 41 inadequately represented him in his grievance over his September 18 termination, although time-barred for § 301 purposes, was timely filed for LMRDA purposes. *See Marshall v. Local Union No. 6, Brewers & Maltsters & Gen. Labor Dep'ts,* 960 F.2d 1360, 1367 (8th Cir. 1992). Nevertheless, the record evidence is insufficient for Clark to overcome a motion for summary judgment.

*Franza v. Int'l Bhd. of Teamsters, Local 671,* 869 F.2d 41, 47 (2d Cir. 1989), and Local 41 did not actually discipline Clark for failing to pay dues, but merely threatened to take action, thereby providing Clark with incentive to satisfy his financial obligation.

Clark's other claim under the LMRDA is that Local 41 maliciously prosecuted him before the Teamsters joint resolution panel, and that he was injured because the joint council refused to dismiss charges of misuse of union funds and nonparticipation in union events prior to holding a hearing. As with his payment-of-dues claim, Clark has not alleged any direct interference with vested rights, because he was not disciplined. The responsibility to defend oneself at a hearing is not tantamount to discipline.

* * *

For the foregoing reasons, the judgment of the district court is affirmed.

HEANEY, Circuit Judge, concurring in part and dissenting in part.

I agree with the majority that the district court was within its discretion to impose sanctions for the plaintiffs' failure to comply with local rules of procedure, and further agree that the district court properly granted summary judgment on the race discrimination, age discrimination, and whistleblower claims. In my view, however, the plaintiffs presented sufficient evidence to create a jury question on the issue of whether they were terminated in retaliation for their union activities. Accordingly, I dissent from the portion of the majority's opinion affirming the

grant of summary judgment in favor of the defendants on these claims.[5]

The uncontroverted facts presented to the district court were as follows: Both Stephen Jones and Doyle Clark were long-time employees of UPS, enjoying tenures of roughly twenty-eight and twenty-three years, respectively. Jones had never experienced significant disciplinary problems; Clark had been fired and reinstated once in 1997. It was not until Jones and Clark embroiled themselves in a contested union election that either faced further discipline.

Jones and Clark were vocally critical of the union administration and actively campaigned for opposition candidates. Clark, in fact, campaigned for and was elected to the position of recording secretary. The timing of critical events with regard to their political activities and their discipline clearly raises an inference that Jones and Clark suffered adverse employment effects as a consequence of their opposition to the incumbent union administration. Clark was nominated as a candidate for the position of recording secretary on September 14, 2002; four days later, he was suspended two days for job abandonment.[6] On October 15, 2002, the union election was held, and Clark was elected recording secretary. He was fired the

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[5] Both the district court and the majority declined to reach the issue of whether UPS violated the collective bargaining agreement, because they found no breach of the union's duty of fair representation, a necessary precondition to prevailing on a hybrid § 301 claim. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-71 (1976). Accordingly, I focus my dissent on this point of disagreement.

[6] Clark was initially fired, but was able to reach a resolution with UPS whereby he was reinstated after a two-day suspension.

next day. Less than a month later, Jones, who actively campaigned for the opposition slate of candidates, was fired. In his prior twenty-eight years of service, Jones presented no meaningful disciplinary concerns.

Moreover, the reasons given for terminating each employee were suspect. Clark was fired for "insubordination towards management" relating to his assignment as a haz-mat responder. (Local 41 App. at 11.) Specifically, he committed the offenses of not using his two-way radio during a shift, and acting insubordinately during a meeting with his supervisor regarding the two-way radio. Although management characterized the failure to carry the two-way radio as a serious offense that endangered Clark's fellow employees, Clark was not disciplined until his shift was over. The insubordination charge was based primarily on an exchange in which Clark's supervisor repeatedly asked if Clark carried the radio in his pocket, and Clark repeatedly answered that he did not put things that did not belong to him in his pockets. For this, UPS ended Clark's twenty-three year career with the company.

Jones was fired after a dispute regarding his route as a driver. He typically drove a route from Lenexa to Wichita, Kansas. In the months prior to his termination, Jones's Wichita route was increasingly cut. When that happened, he was usually given the option of driving another route or going home. When his route was cut on November 11, 2002, however, Jones was asked to drive another route. Instead, Jones opted to go home – an option indisputably open in the past. His view was that this was not job abandonment because his job was to drive the Wichita route, and it was not available. In other words, his job was cut, so there was no job for him to abandon. Jones's supervisor claimed to have disagreed with this

interpretation, but he assisted Jones with clocking out when the electronic time clock gave him trouble. The supervisor did not call a manager or union steward to resolve the conflicting interpretation, and Jones was allowed to leave without incident or warning of potential future discipline. The next day, when Jones arrived at work, he was informed that UPS disagreed with his interpretation of what constituted job abandonment. As discipline, the company terminated a person who had given it nearly thirty years of service.

From this evidence, one could certainly conclude that Jones's and Clark's terminations were not wholly justified, but were rather the products of collusion between UPS and local union members to remove Jones and Clark for their union-based political activities. Evidence of their political activity or the split factions within Local 41, however, was never adequately presented to the Mo-Kan panel.[7] In fact, it was not addressed at all by either the

[7] The Mo-Kan panel is the appellate body for grievances such as those in this case. That panel is made up of six members: three from the company and three from the union. An aggrieved employee is bound by the decision of the Mo-Kan panel unless it deadlocks. I question whether this structure truly affords the aggrieved party a fair review of their dispute, for the panel is comprised of people with an interest in the outcome of each case. I recognize that often the decisionmaker's interest may be attenuated because union panel members are chosen from different local unions than the aggrieved employee, but still believe this panel is no substitute for a truly independent body. *See Gen. Drivers Union, Local 554 v. Young & Hay Transp. Co.*, 522 F.2d 562, 567 n.5 (8th Cir. 1975) (Heaney, J.) (noting, for the court, "serious reservations" with regard to the Teamsters' joint grievance committee composition because "[t]he opportunities for discrimination against the dissident employee with a legitimate grievance or the small employer in competition with those who help control the joint panel are too real to be ignored"). Although the Supreme Court and our court have equated this procedure to arbitration, *Hines v. Anchor Motor Freight, Inc.*, 424

(Continued on following page)

company or the union's business agents.[8] The business agents' failure in this regard qualifies as perfunctory treatment that, when considered contextually, supports the inference that bad faith motivated the union's representation of Jones and Clark. *See Vaca v. Sipes,* 386 U.S. 171, 177, 194 (1967) (holding that bad faith conduct or the processing of a grievance in a perfunctory manner breaches the union's duty of fair representation). Thus, I respectfully dissent from that portion of the majority opinion affirming the district court's holding that Jones and Clark failed to make a case that they were dismissed in retaliation for their union activities.

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U.S. 554, 557 n.2, 562-64 (1976); *Tbngay v. Kroger Co.,* 860 F.2d 298, 300 (8th Cir. 1988), I continue to harbor my own doubts.

[8] Each employee was permitted to present any evidence they wished at the Mo-Kan hearing, and each stated they were satisfied with the union's representation. Certainly, this evidence weighs in favor of the union's position that it fairly represented Jones and Clark. It is not dispositive, however, given the evidence summarized above regarding how closely the employees' terminations coincided temporally with their activities in opposition to the union leadership.

**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

No. 05-2202/05-2205

| | | |
|---|---|---|
| Stephen C. [sic] Jones, Appellant, Doyle Clark, Appellant, v. United Parcel Service, Inc.; Local 41 of the International Brotherhood of Teamsters, Appellees. | * * * * * * * * * * * * * * | Appeal from the United States District Court for the Western District of Missouri. |

**JUDGMENT**

(Filed November 27, 2006)

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

(5172-010199)

August 22, 2006

Order Entered in Accordance with Opinion:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

**IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION**

| | | |
|---|---|---|
| **STEPHEN E. JONES and DOYLE CLARK,** | ) | |
| **Plaintiffs,** | ) | **Case No. 03-0284-CV-W-GAF** |
| **vs.** | ) | |
| **UNITED PARCEL SERVICE, INC., and LOCAL 41 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS,** | ) | |
| **Defendants.** | ) | |

**ORDER**

(Filed April 7, 2005)

## I. Introduction

Presently before the Court are motions for summary judgment on the claims of Plaintiff Doyle Clark ("Clark") submitted by Defendants United Parcel Service, Inc. ("UPS") (Doc. 318) and Local 41 of the International Brotherhood of Teamsters ("Local 41") (Doc. 310)[1] (collectively as "Defendants"). Clark has asserted several claims against both Defendants. In his First Amended Complaint, Clark alleges that UPS violated the collective bargaining agreement between UPS and Local 41 in violation of Section 301 of the Labor Management Relations Act, 29

[1] Local 41's motion for summary judgment (Doc. 310) deals with the claims submitted against it by both Plaintiffs in this case. This order deals exclusively with the facts and arguments in that document that pertain to Plaintiff Clark.

U.S.C. § 141 *et seq.* ("LMRA"), discriminated against him and discharged him based on his age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 601, *et seq.* ("ADEA"), discriminated against, harassed, and discharged him in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"). In addition to his claims against UPS, Clark asserts that Local 41 breached its duty to fairly represent him under Section 301 of the LMRA and violated his rights as a union member granted by Section 101 of the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 411 ("LMRDA"). Clark has opposed this motion. For the following reasons, Defendants' motions are hereby GRANTED.

## II. Facts

Before this Court proceeds to its finding of facts with regard to the motions for summary judgment now before it, a threshold issue on the factual statements and suggestions submitted by the parties must be addressed. The two defendants in this case, UPS and Local 41, filed three motions for summary judgment on the claims brought by Plaintiffs Clark and Stephen E. Jones ("Jones") (collectively as "Plaintiffs"). Local 41 filed one motion (Doc. 310) and suggestions in support (Doc. 312) which were directed at the claims of both Plaintiffs. UPS filed two motions each with suggestions in support which were directed separately at the claims of Clark (Doc. 318 & 320) and Jones (Docs. 319 & 321).

Plaintiffs, by and through their attorneys, sought leave of this Court on several occasions for certain concessions in mounting their response to the motions for summary judgment. Not only did the Court afford more time to

Plaintiffs, but it also granted Plaintiffs leave to consolidate their responses to the Defendants' motions based upon the representation that such a combination would be "more efficient and expedient for the parties and for the Court." (Doc. 349 at ¶ 7). As a result, Plaintiffs produced document so unwieldy and so full of factual and legal misstatements as to render itself repugnant to the very concept of judicial economy. Plaintiffs' Memorandum in Opposition to Defendants' Motions for Summary Judgment (Doc. 373) totals 480 pages. Plaintiffs' brief bombards the Court with information that is largely irrelevant and inadmissible. Upon a review of the document, it is almost incomprehensible that it could at once be so utterly oppressive by means of its shear size, while at the same time remain so completely pedestrian and underwhelming in its execution.

After the surprisingly brief introduction, Plaintiffs set forth a 948 paragraph Statement of Controverted Fact ("Fact Statement") which spans 168 pages. (Doc. 373 pp. 2-169). Much of the information contained in this mendacious recounting of "fact" is either misstated, inadmissible, or wholly unsupported by the record. The instances of these shortcomings are far too numerous to list here, but the Court will attempt to provide examples below. Following the gargantuan Fact Statement, Plaintiffs set forth their Responses to the defendants various statements of uncontroverted facts ("Responses"), which totals 179 pages. (Doc. 373 pp. 169-348). As with the Plaintiffs' Fact Statement, their Responses are not only largely unsupported by the record, but also are set forth in manner completely inconsistent with the Local Rules of this Court. Finally, Plaintiffs conclude their titanic document with

132 pages of argument in opposition to summary judgment. (Doc. 373 pp. 348-480).

As stated above, the Plaintiffs' 948 paragraph Fact Statement contains numerous and egregious misrepresentations and misstatements. In an effort to illustrate the appalling nature of these representations, the Court offers some examples. In paragraph 243 of Plaintiffs' Fact Statement, they assert that Jeff Johnson ("Johnson"), the UPS manager who made the decision to terminate Clark, called an African-American UPS employee, who was 55 or 56 years old, an "old black fart." (Doc. 373 at p. 39). The Plaintiffs assert this "fact" on the basis of testimony from witness Harold McLaughlin ("McLaughlin"). A review of the testimony that McLaughlin provided at his deposition, however, shows convincingly that he never stated that Johnson had made such a comment. In fact, the testimony which purportedly supports this statement conclusively demonstrates that McLaughlin stated that he did not hear Johnson call the man an "old black fart." In response to a question which asked if McLaughlin had ever heard Johnson make a racial comment, he replied, "[i]f I was to sit here and say that [Johnson] said anything about him being an old black fart . . . if I was to sit here and say, he actually said that to me I would probably be wrong." (McLaughlin Depo. p. 349:20-24).

Another example of a complete misstatement of the record is contained in paragraph 246 of the Fact Statement where Plaintiffs assert that "Jeff", presumably referring to Jeff Johnson, told Clarence Logan ("Logan"), a former UPS employee, to "get those niggers off their asses," in reference to a group of African American employees. (Doc. 373 at pp. 39-40). Once again, Plaintiffs base his assertion on Logan's deposition testimony. A review of

the transcript, however, indicates that the statement was not made by Johnson or, in fact, anyone named "Jeff". Logan stated that "another supervisor", who was an African American, named "Danny" and referred to as "Big D", made the comment that Plaintiffs have attempted to attribute to Jeff Johnson. (Logan Depo. p. 207:6-25).

A final example of the unsupported and unreliable nature of Plaintiffs' Fact Statement is paragraph 228. In that portion, Plaintiffs assert that Johnson was transferred from the James Street facility to the Lenexa facility after a group of mostly African American employees complained about Johnson being a racist and discriminating against them (Doc. 373 at p. 36). While the Plaintiffs direct to the Court to five exhibits, not a single one supports the proposition that they advance in paragraph 228. (*See* Fritz Aff. ¶ 19; Logan Aff. ¶ 21; Terry Johnson Aff. ¶¶ 8-9; Terry Johnson Depo. pp. 17:19-18:3; Brown Depo. Pp. 61:18-62:7).

As glaringly inept as many of the representations in the Fact Statement are, Plaintiffs' Responses are even more incredible. Most of Plaintiffs' attempts at controversion are either unsupported by record or blatantly nonresponsive to the facts presented by the Defendants. These poor attempts to controvert the Defendants' factual statements are not only clumsy and unprofessional, but are most certainly noncompliant with the Local Rules. Local Rule 56.1 mandates that suggestions in opposition to a motion for summary judgment shall begin with a "concise listing of material facts" on which the party contends a genuine issue exists. Every fact in dispute is to be set forth in a separate paragraph and "refer specifically to those portions of the record" on which they rely for the controversion. Further, Local Rule 56.1 dictates that "[a]ll facts

set forth in the statement by the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party." Again, the occurrences are far too numerous to list here and, therefore, the Court will be forced to offer examples to demonstrate these violations.

The most shocking examples of Plaintiffs' attempts at controversion are the instances in which they attempt to dispute paragraphs which are supported by testimony from their own depositions. It is well established in this jurisdiction that a Plaintiff is unable to create a genuine issue of material fact sufficient to survive summary judgment which contradicts his prior sworn deposition testimony. *Knudsen v. United States,* 254 F.3d 747, 752 (8th Cir. 2001). One of the more atrocious examples is Plaintiffs' response to paragraph 90 of Local 41's Statement of Uncontroverted Fact. In paragraph 90, Local 41 asserts that "[o]n October 16, 2002, when Clark reported for work at UPS, Mike Bayers, a UPS supervisor, told him he would need to work as a haz-mat responder on the preload sort, rather than as a sorter." (Doc. 312 at p. 16). This statement is directly supported by Clark's own sworn deposition testimony. (Clark Depo. p. 40:1-10). In a pointless attempt to controvert a fact that is admitted for the purposes of this trial and, therefore, incontrovertible, Plaintiffs launch into an argument that spans four pages of single-spaced type and cites numerous depositions and affidavits. (Doc. 373 at pp. 194-97). Displays such as this are common throughout Plaintiffs' Responses and are not only futile, but have also have undoubtedly engendered a significant waste of time and resources. As such, this Court can only conclude that they were created for the sole

purpose of causing unnecessary delay and a needless increase in the cost of litigation.

Additionally, Plaintiffs' Responses frequently engage in argument in opposition to Defendants facts without directing the Court to any portion of the record for support. As an example, the Court cites Plaintiffs' Response to Local 41's paragraph 79. In that paragraph, Local 41 asserts that union business agent John Thompson ("Thompson") was present at the UPS facility for another matter on the morning of September 18, 2002, and as a result, "a local hearing was immediately convened on Clark's discharge." (Doc. 312 at p. 14). Again, Local 41 supports this information with direct citations to the record, including, once again, Clark's deposition. Plaintiffs Response wanders for a half a page through a conspiracy theory regarding Thompson's availability on that morning without offering so much as a single citation to the record for support. (Doc. 373 at p. 190). In a halfhearted attempt to somehow ground their wild assertions in some form of support, Plaintiffs conclude their massive run-on paragraph with a general citation to their entire 948 paragraph Fact Statement. (Doc. 373 at p. 190).

Finally, many of Plaintiffs' attempts to controvert facts do not specifically refer to the portions of the record, but merely contain cross-references to other paragraphs, which oftentimes have no support. As an example, this Court notes Plaintiffs Response to paragraph 50 of UPS' statement of uncontroverted fact in its motion for summary judgment on Clark's claims. (Doc. 373 at p. 266). In that paragraph, UPS asserts that, in his deposition, Clark admitted to having no knowledge of either (1) "any other main responder on the preload whom supervisors had to go find to respond every time there was a leak or spill

during the shift"; or (2) "any main responder who refused to use a radio as instructed or failed to answer supervisors' calls during an entire shift." (Doc. 320 at p. xxiv). This information comes directly from Clark's deposition and is fully supported by the record. (Clark Depo. pp. 60:24-61:8). Plaintiffs baldly claim that this information is controverted and direct the Court to "[s]ee Responses" to various statements of fact as well as paragraphs from their own Fact Statement, many of which, as noted above, are themselves not supported by relevant or admissible evidence from the record.

This Court finds that Plaintiffs' 948 paragraph Statement of Controverted Fact is neither in compliance with the requirements of Local Rule 56.1 and Rule 56 of the Federal Rules of Civil Procedure, nor, for the most part, supported by any competent or admissible evidence. This Court finds further that Plaintiffs responses to Defendants statements of uncontroverted fact have also failed to comply with the Local Rules of this Court and the Federal Rules of Civil Procedure. Accordingly, all submissions made by Plaintiffs in those portions of Doc. 373 are disregarded as noncompliant with the Local Rules and the Federal Rules of Civil Procedure and, as a result, all factual assertions by Defendants are deemed as admitted.

A. Background on Union Procedure

In 2002, the collective bargaining agreement ("CBA") between UPS and Local 41 consisted of three documents: (1) the National Master United Parcel Service Agreement; (2) the Central Region Supplement Agreement with appended memoranda of agreement; and (3) the Local Rider. Under the teams of the CBA, an employee who

believes that he has been disciplined unfairly may have a union steward or business agent file on his behalf a grievance challenging the disciplinary action. The CBA expressly states that employees may be suspended or terminated for just cause. In addition to specifically enumerated offenses that warrant an employee's termination, the CBA provides for termination for "other serious offenses" which has been applied to situations involving job abandonment, failure to follow instructions, and insubordination.

If an employee who is covered by the CBA believes that UPS has somehow violated the employee's rights under the CBA, there are several potential steps involved in seeking a remedy. The employee must first pursue that matter by having a steward or business agent file a grievance on the employee's behalf. It is undisputed that, unless UPS' direction involved something immoral, illegal, or unsafe, the usual practice in regard the filing of grievances was for the employee to perform the work assignment that they believe violated that CBA and file a grievance after his shift. After filing a grievance, representatives of both Local 41 and UPS would meet to discuss the matter in an informal hearing.

Any matter that cannot be resolved by an informal hearing would require the representatives from Local 41 and UPS hold a more formal proceeding, known as a local hearing. The employee who filed the grievance would normally attend the local hearing and the positions of each side would be outlined with statements based on personal knowledge offered in support. If no disposition of the matter agreeable to both sides could be reached, the matter could be referred to a two-state Missouri-Kansas ("MoKan") panel.

Meeting on a monthly basis, the MoKan panel considers deadlocked disciplinary grievances and certain deadlocked contract-interpretation grievances from Teamsters Locals located in Missouri or Kansas. The MoKan panel consists of an equal number of representatives from the Teamsters Union and UPS. Common practice prohibits a Teamster representative from hearing a grievance filed by an employee from the Local that he is from. Likewise, UPS representatives may not sit on a panel determining matters relating to a grievance filed out of the center to which that UPS representative is assigned.

At a MoKan panel disciplinary hearing, UPS bears the burden of proof and presents its case first, usually by having the manager involved in the employment action outline the circumstances surrounding the disciplinary action. Witnesses may be called and evidence may be offered, including written statements from other managers or supervisors who witnessed relevant events. Next, the local union, represented by a business agent, will present its case in support of the grievance. Like UPS, the local union is allowed to call witnesses and offer evidence. Both sides are afforded the opportunity to respond to the other. After all the evidence is presented and the MoKan panel has had opportunity to question the representatives, the employee who filed the grievance, and any of the witnesses. The panel then debates the grievance in a closed meeting before orally announcing its determination. If the MoKan panel is unable to reach a decision on the grievance, the matter maybe taken to the Joint Area Committee which draws its committee members from a wider geographical area than the MoKan panel.

B. Doyle Clark's Employment and Termination

Clark is an African American and was 43 years old at that the time of his termination from UPS on October 16, 2002. (Clark Depo. p. 5:1-2). He was hired by UPS in 1979 to work as a part-time employee at UPS' facility in Kansas City, Kansas ("James Street"). (Clark Depo. pp. 8:19-9:1). Clark is a member of Local 41 and served as union steward for 15 years while he worked at the James Street facility. (Clark Depo. pp. 12:23-13:3). During his time as a steward, Clark filed many grievances on behalf of himself and other UPS employees at James Street between 1998 and 2000. (Clark Depo. pp. 113:24-114:2). In September of 1997, while Clark was employed at James Street, he was fired and later reinstated for job abandonment. (Clark Depo. p. 222:3-10; Clark NLRB Aff. at p. 2). In April of 2000, Clark was transferred to UPS' Lenexa, Kansas facility ("Lenexa"). (Clark Depo. p. 9:4-8). During his time at Lenexa, Clark was not a union steward for Local 41 as he had been at James Street and filed no grievances on behalf of himself or any other UPS employees. (Clark Depo. pp. 12:23-13:3; 115:5-9).

During his time at Lenexa, Clark held a full-time "Article 22.3" combination job.[2] (Clark Depo. p. 11:13-17). Clark's positions included working as a package sorter on the morning preload shift and as a hazard materials ("hazmat") responder on the day sort.[3] (Clark Depo. p. 11:13-17). One way for determining jobs for employees on

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[2] Under Article 22.3 of the CBA, full-time jobs were created by combining part-time jobs from different shifts.

[3] At UPS' Lenexa facility there were four sorts which are roughly comparable to shifts. They are: (1) the preload (morning) sort; (2) the day sort; (3) the twilight sort; and (4) the night sort.

any given day was by seniority. Clark's full-time seniority date at UPS was July 10, 2000. Clark's duties on the preload shift normally entailed sorting packages onto conveyor belts after they had been unloaded from trailers by other employees. When working as a hazmat responder on the day sort, Clark's duties included making determinations as to whether leaking packages or spills in the warehouse involved hazardous materials. (Clark Depo. pp. 371:14-372:12). In addition to making these determinations, Clark was required to cleanup leaks and spills and to rewrap the packages that had been leaking. (Clark Depo. pp. 371:14-372:12). UPS had trained Clark in the procedures required for the hazmat responder position and he was certified to fill that position in 2000. (Clark Depo, pp. 369:24-371:9). In addition to his sorter job on the preload and his hazmat responder job on the day sort, Clark was required to "work as directed." (Clark Depo. p. 15:5-8).

*1. September 18, 2002 Termination*

On September 18, 2002, Clark reported to work at 3:45 a.m. for the preload sort. (Clark Depo. p. 17:1-4). Lee Lydick was Clark's direct supervisor at the time believed that Clark was reporting early in order to receive "extra work" before his regular shift. The term "extra work" in this context refers to the practice of employees starting work prior to their start time. When a UPS employee was performing "extra work" under the contract, the employee should work as the supervisor assigns them. The significance of this is that the employee is not entitled to use his seniority to remove other employees from their bid jobs. Clark maintains that his regular start time on September 18 was 3:45a.m. (Clark Depo. p. 17:17-25). Lydick assigned

Clark to unload a trailer instead of his usual bid job of sorting. (Clark Depo. p. 18:1-4). Lydick contends that his decision was premised on the belief that Clark was preforming [sic] "extra work" and the fact that Lydick did not have a sufficient amount of employees to unload that morning.

Although Lydick told Clark to unload, Clark disputed this direction and argued that he was entitled to sort by virtue of the contract. (Clark Depo. p. 18:5-11). According to Clark, Lydick told him that "[i]f you're not going to unload, you're not going to work at all." (Clark Depo. p. 22:2-4). After this exchange, Clark decided to leave work rather than unload. (Clark Depo. pp. 20:14-21:1). According to Clark, he passed UPS manager Jeff Johnson ("Johnson") on his way to the time clock and informed him that he was leaving since he could not work, (Clark Depo. p. 20:14-21:1). When he attempted to clock out, Clark claims that time clock would not work properly and, therefore, he was unable to actually clock out. (Clark Depo. p. 21:9-13). Clark did not inform any UPS supervisor or manager about his inability to clock out.

Later that morning, at approximately 10:15 a.m., Clark returned to perform the second shift of his job as a hazmat responder on the day shift. (Clark Depo. p. 394:19-21). He was accompanied by union steward and co-plaintiff Stephen Jones ("Jones"). (Clark Depo. pp. 394:19-395:19). Upon his return, Clark filed a grievance ("Septem[illegible] Grievance") claiming that his seniority had been violated by Lydick's directive assigning him to unload. (Clark Depo. p. 395:12-19). Johnson terminated Clark for job abandonment. (Clark Depo. pp. 395:25-396:1). It is undisputed that the contract contains no provision allowing employees to refuse to work or to leave work because they are unhappy

with their work assignments. The grievance made no mention that this violation was based on age or race discrimination. (Clark Local 41 Grievance of September 18, 2002). UPS and Local 41 considered the September Grievance to include Clark's termination and, later that afternoon, a local grievance meeting took place for the purpose of discussing Clark's discharge and the alleged seniority violation. John Thompson ("Thompson"), a Local 41 business agent, Jones, and Clark were present on Clark's behalf and Johnson and UPS Lenexa Labor Manager Larry Baldwin were present for UPS. (Clark Depo. p. 36:13-17).

At the meeting, UPS' position was that it considered the unloading "extra work" because it was performed prior to Clark's normal start time and, therefore, not part of his normal bid job or sorting. Clark took the position that his scheduled start time was 3:45 a.m. and, as a result, the unloading assignment was in violation of his right to perform his bid job. (Clark Depo. pp. 17:1-18:11). In an attempt to resolve the matter, UPS offered to reduce the termination to a two-day suspension which would include September 18, 2002. (Clark Depo. p. 398:4-11) This offer was an alternative to having a discharge hearing set for the next MoKan panel meeting, which would require Clark to remain off work for a longer amount of time. (Clark Depo. p. 398:12-14). Clark wanted the advice of fellow employee Harold McLaughlin ("McLaughlin"), a former Local 41 business agent, before making his decision and was permitted to call him on the phone. (Clark Depo. p. 398:18-21). McLaughlin also recommended that Clark take the suspension rather than proceed to the MoKan panel. (Clark Depo. pp. 399:18-400:15). Clark decided to take

UPS' offer of a two-day suspension. (Clark Depo. p. 401:7-13).

*2. October 16, 2002 Termination*

On October 16, 2002, Clark reported to work at UPS for the preload sort. The supervisor, Mike Bayers ("Bayers") informed Clark that he would be needed to work as a hazmat responder on the preload sort rather than assume his job as a sorter. (Clark Depo. p. 40:1-4). On the morning of October 16, both the regular hazmat responder for the preload shift, Ronne Williams, and his backup, Gerry Shriner, were on vacation. (Clark Depo. p. 42:6-12). Mike McMullin ("McMullin"), who had become the preload sort supervisor for Lenexa in September of 2002, had determined that he was short of staff that morning and that Clark was the only qualified hazmat responder in the area. Clark asked if there was someone else who was able to do the job. (Clark Depo. pp. 40:22-41:1). Bayer responded by telling Clark that, "it doesn't matter, we want you to respond" (Clark Depo. p. 41:2-3). After conferring with Local 41 steward Greg Toplikar ("Toplikar"), Clark stated that he would perform the hazmat duties on the preload sort, but intended to file a grievance. (Clark Depo. pp. 45:24-46:4).

When Clark normally worked as a hazmat responder, during the day sort, there were several responders on each shift. (Clark Depo. pp. 44:8-10; 47:7-48:9). The preload sort at Lenexa, however, had only one main hazmat responder. Prior to October 16, Clark had not worked as a hazmat responder on the preload sort. The preload sort hazmat responder was required to carry a two-way radio so supervisors could contact the responder and notify him about

leaking packages or spills in the warehouse. (Clark Depo. p. 47:3-6). The radios were required because, unlike the shifts during the day which had a supervisor assigned to dispatch the responders, no supervisor was assigned to dispatch the preload hazmat responder. (Clark Depo. pp. 47:7-48:9). As a result, preload hazmat responders would answer calls from supervisors on the radio and respond accordingly. Clark was given a radio that morning for use in his duties as the preload hazmat responder and Bayers showed him how to use it. (Clark Depo. p. 46:13-15). During the morning of October 16, Clark performed responder work in several areas of the warehouse and was very busy responding to leaks and spills. Clark understood that he was expected to keep the radio with him so that supervisors could notify him if there were leaks or spills that he needed to respond to. (Clark Depo. p. 47:3-6). Clark maintains that he tried to keep the radio where he could hear it, but during the preload shift that morning, several supervisors and manager Johnson made calls to Clark's radio that went unanswered. Clark claims not to have heard any of the supervisor calls on the radio, but concedes that McMullin came to him about five times that morning to tell him that there was a leaking package and to give him the location. (Clark NLRB Aff., p. 6). Clark also has admitted that he did not answer any calls on the radio the morning of October 16, 2002. (MoKan Transcript pp. 0058 & 0060).

Following the preload shift, Johnson and McMullin met with Clark to discuss Clark's failure to answer calls made to him on the radio. Johnson asked Clark whether McMullin had told him to put the radio in his pocket. (Clark Depo. p. 84:5-8). Clark responded by saying he told McMullin that he would not put anything in his pocket

that did not belong to him, but that he would keep the radio with him. (Clark Depo. p. 84:9-12). At that meeting both Johnson and Toplikar tested Clark's radio and determined that it was working properly. (Clark Depo. p. 123:9-15). Clark has stated that he told Johnson he did not hear anyone call him on the radio. (Clark Depo. p. 85:6-9). Johnson then terminated Clark. (Clark Depo. p. 88:4). The UPS termination notice states that Clark was fired for insubordination and refers to the incident on September 18, 2002. (Clark Depo. Exh. 4).

C. Local 41's Representation of Clark on his October 16, 2002 Termination

Subsequent to Clark's termination on October 16, a grievance ("October Grievance") was filed challenging Clark's discharge and a local hearing was held on October 22, 2002. (Clark Depo. p. 90:1-3). The local meeting was attended by Clark, Thompson, and Toplikar on behalf of Local 41 and UPS managers Johnson and Larry Baldwin. (Clark Depo. p. 90:18-23). Thompson undertook the representation of Clark. Before the local hearing, Thompson investigated the grievance by speaking with both Clark and Toplikar. Additionally, Thompson reviewed the grievance and the written statement submitted by Toplikar. During the local hearing, Clark was able to give his version of the events that led to his termination. UPS and Local 41 could not reach a resolution on Clark's termination at the local hearing. In light of the resulting deadlock, Local 41 pursued the grievance to the MoKan Panel.

At no point following the local hearing did Clark tell Thompson that he disagreed with the manner in which the hearing was held. Furthermore, Clark did not attempt to contact Thompson between the local healing and the

MoKan Panel hearing. (Clark Depo. p. 446:15-18). Clark, however, did discuss the grievance with Toplikar, who was Local 41 steward. (Clark Depo. p. 443:19-23). Thompson spoke a couple of times with UPS manager Baldwin in an effort to obtain Clark's reinstatement. (Thompson Depo. pp. 32-33).

Clark's MoKan Panel hearing took place on October 24, 2002 in Kansas City, Missouri. (Thompson Decl. Exh. 1). Thompson and Clark met a for a few minutes shortly before the hearing. (Clark Depo. p. 122:13-14). At this time, Thompson outlined the strategy that he had planned for the hearing. (Clark Depo. p. 122:17-19). Clark did not have any disagreement with Thompson's strategy for the hearing at that time. (Clark Depo. p. 122:20-22).

The MoKan panel that sat for Clark's grievance hearing consisted of six members. The three members from the Teamsters were Mike Goebel, a representative of Teamsters Local 688 in St. Louis, Missouri; Bill Moore, a representative of Teamsters Local 696 in Topeka, Kansas; and Fred Potts, a representative of Teamsters Local 245 in Springfield, Missouri. UPS was equally represented on the MoKan by managers Sharon Ring, John Samberg, and Curt Kruse.

As is required during a MoKan Panel hearing, UPS presented its case first. Johnson, accompanied by Gudim and Baldwin, put on the case. (MoKan Transcript p. 0049). Johnson generally noted that Clark was terminated for insubordination and failure to follow instructions from management. (MoKan Transcript p. 0049). A statement was offered by supervisor Bayers which outlined UPS' position on the circumstances surrounding Clark's termination on October 16, 2002. (MoKan Transcript p. 0049).

Next, McMullin told the MoKan panel that he had to physically seek Clark out to respond on at least three occasions because he had not answered calls on the radio; he repeatedly told Clark to keep the radio with him or put it in his pocket; and on one occasion, he went looking for Clark in the hazmat responder area and Clark was not there, but the radio was. (MoKan Transcript pp. 0048-0049). McMullin said that he then found Clark and told him to put the radio in his pocket, which Clark refused to do. (MoKan Transcript p. 0049).

Near the conclusion of UPS' case, Johnson informed the MoKan panel of Clark's suspension from September 18, 2002, which the panel accepted for consideration. (MoKan Transcript p. 0051). Additionally, Johnson attempted to introduce evidence of a pending suspension that Clark had on file for attendance violations. (MoKan Transcript p. 0051). Thompson objected, asserting that these were open and unresolved issues and, as a result, could not be considered by the panel. (MoKan Transcript p. 0051). The panel sustained the objection and would not consider that evidence. (MoKan Transcript p. 0051).

After UPS rested, Thompson began his presentation of Clark's case. (MoKan Transcript p. 0051). After reading Clark's October Grievance into the record, Thompson introduced evidence showing that Clark's duties on the preload were as a sorter and not as a hazmat responder. (MoKan Transcript p. 0052). Thompson also stated to the MoKan panel that Clark responded to leaking packages every time he was made aware of one and had the radio with him at all times, except when he went on break or to the restroom. (MoKan Transcript p. 0052). Thompson also argued that even though Clark may not have answered Johnson's questions the way he wanted, Clark's answers

had been "twisted" into insubordination by management. (MoKan Transcript p. 0052). Additionally, Thompson brought the absence of any statements from two supervisors who allegedly had trouble communicating with Clark about leaking packages that morning. (MoKan Transcript p. 0052). He also noted that several employees who were qualified as hazmat responders and that had less seniority than Clark were present on the morning of October 16, 2002 and could have been assigned to respond. (MoKan Transcript p. 0052).

In support of Clark's position, Toplikar read a statement to the panel that described the exchange between Clark and Johnson about the radio. (MoKan Transcript p. 0052-0053). Toplikar's statement asserted that Johnson had asked repeatedly whether Clark had been told to put the radio in his pocket and each time Clark responded that he would not put anything in his pocket that did not belong to him. (MoKan Transcript p. 0053). The statement also noted that McMullin's radio was not working properly that morning, which could potentially have interfered with his calls to Clark. (MoKan Transcript p. 0053).

Clark then spoke to the MoKan panel in support of his grievance. (MoKan Transcript p. 0053). He said that when he reported for work on October 16, 2002, Toplikar told him that he would have to work as a hazmat responder and that there were junior people in the building who were qualified to do that job. (MoKan Transcript p. 0053). He also related that he knew that he needed to file a grievance so that he would "not be terminated for failure to follow instructions." (MoKan Transcript p. 0053). With regard to McMullin's instruction to put the radio in his pocket, Clark told the MoKan panel that he did not want to be accused of stealing and had learned at a young age

never to "put anything in my pocket that doesn't belong to me." (MoKan Transcript p. 0053). He also stated that he had once seen a supervisor removed from UPS in handcuffs for putting something in his pocket. (MoKan Transcript p. 0053). Clark stated that he responded whenever someone came to get him. (MoKan Transcript p. 0053). During his statement, Clark was not interrupted, cutoff, or otherwise prevented from saying what he wanted.

After UPS presented a rebuttal, Clark spoke again spoke in support of his grievance and Thompson attempted to return the focus to the issue of Clark's seniority. (MoKan Transcript pp. 0055-0056). Afterwards, the members of the MoKan panel posed questions to each side. (MoKan Transcript pp. 0057-0061). During this exchange, Clark admitted twice that he did not answer any calls on the radio on the morning of October 16, 2002. (MoKan Transcript pp. 0058 & 0060). Clark claimed that his failure to answer calls was because he was not accustomed to responding to the radio. (MoKan Transcript p. 0059). At the conclusion of the hearing, when Clark was asked if he had been properly represented at the hearing by Local 41 representatives, including Thompson, he responded that he had. (MoKan Transcript p. 0062). Clark also acknowledged that he was allowed to present "any and all" evidence pertaining to his case. (MoKan Transcript p. 0062). After recessing to consider the matter, the MoKan panel denied Clark's grievance. (MoKan Transcript p. 0062). Since Clark's termination from UPS, however, he has remained a member of Local 41 and continues to serve on the executive board as recording secretary.

## III. Standard

Rule 56(c), Federal Rules of Civil Procedure, provides that summary judgment shall be granted if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." If there is no genuine issue about any material fact, summary judgment is proper because it avoids needless and costly litigation and promotes judicial efficiency. *Roberts v. Browning,* 610 F.2d 528, 531 (8th Cir. 1979); *United States v. Porter,* 581 F.2d 698, 703 (8th Cir. 1978). The summary judgment procedure is not a "disfavored procedural shortcut." Rather, it is "an integral part of the Federal Rules as a whole." *Celotex Corp. v. Catrett,* 477 U.S. 317, 327 (1986); *see also City of Mt. Pleasant v. Associated Elec. Coop., Inc.,* 838 F.2d 268, 273 (8th Cir. 1988).

While a summary judgment is a "drastic remedy" which should be exercised with extreme care, it is appropriate against a party who fails to make a showing sufficient to establish that there is a genuine issue for trial about an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Wabun-Inini v. Sessions,* 900 F.2d 1234, 1238 (8th Cir. 1990); *Celotex,* 477 U.S. at 324. The Eighth Circuit has noted that summary judgments should be used sparingly in the employment discrimination context. *Crawford v. Runyon,* 37 F.3d 1338, 1341 (8th Cir. 1994). However, there is no "employment discrimination exception" to Rule 56, and as with any other type of suit, a discrimination case which presents no genuine issue of material fact is ripe for summary judgment. *See Berg v. Norand Corp.,* 169 F.3d 1140, 1143 (8th Cir. 1999).

In ruling on a motion for summary judgment, it is the court's obligation to view the facts in the light most favorable to the adverse party and to allow the adverse party the benefit of all reasonable inferences to be drawn from the evidence. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157 (1970); *Inland Oil and Transport Co. v. United States,* 600 F.2d 725, 727-28 (8th Cir. 1979). The moving party bears the initial burden of demonstrating by reference to portions of pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, the absence of genuine issues of material fact. However, the moving party is not required to support its motion with affidavits or other similar materials negating the opponent's claim. *Id.* The nonmoving party is then required to go beyond the pleadings and by affidavits, depositions, answers to interrogatories and admissions on file, designate specific facts showing that there is a genuine issue for trial. *Id.* A party opposing a properly supported motion for summary judgment cannot simply rest on allegations and denials in his pleading to get to a jury without any significant probative evidence tending to support the complaint. *Anderson v. Liberty Lobby, Inc.,* 106 S.Ct. 2505, 2510 (1986).

At the summary judgment stage, the judge's function is not to weigh the credibility of the evidence, but rather to determine whether a genuine issue of material fact exists. *Id.* A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The evidence favoring the nonmoving party must be more than "merely colorable." *Id.* at 2511. When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show there is some metaphysical doubt as to the material

facts. *Matsushita Elec. Indus. Co. v. Zenith Radio,* 106 S.Ct. 1348, 1356 (1986) (footnote omitted).

## IV. Discussion

### A. Hybrid Section 301/Duty of Fair Representation

In Count II of his First Amended Complaint, Clark has brought claims against Local 41 and UPS under Section 301 of the LMRA. Clark alleges two separate violations of the CBA by UPS which engendered two separate breaches of Local 41's duty of fair representation. First, Clark asserts that on September 18, 2002, UPS violated the CBA by (1) requiring Clark to perform a job other than his bid job, which violated his seniority rights; and (2) discriminated against him based on age and/or race by requiring him to perform work not required of younger, white employees. Clark also asserts that Local 41 failed to adequately process his September Grievance which he filed in conjunction with these alleged CBA violations.

Second, Clark claims that UPS breached the CBA on October 16, 2002, by discharging him based on his age, race, and/or participation in union elections and other union activities. Clark also filed a grievance against UPS relating to his discharge on October 16, 2002. Additionally, Clark alleges that Local 41 breached its duty of fair representation by acting in an arbitrary, discriminatory, and perfunctory manner in processing his October Grievance.

Defendants now move for summary judgment on these claims asserting that they are entitled to judgment because Clark's claims fail as a matter of law. Clark argues

that he has established a genuine issue of material fact for trial and, thus, Defendants are not entitled to summary judgment.

Section 301 of the Labor Management Relations Act, 1947, provides for suits in federal district court for violations of a collective bargaining agreement between a labor organization and an employer. 29 U.S.C. § 185(a). "Section 301 contemplates suits by and against individual employees as well as between unions and employers; and . . . encompass those seeking to vindicate 'uniquely personal' rights of employees such as wages, hours, overtime pay, and wrongful discharge." *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562 (1976). The scope of Section 301, however, must be balanced with the methods of resolution contemplated by the collective bargaining contracts. Congress has declared that the "final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes." 29 U.S.C. § 173(d). In other words, "[c]ourts are not to usurp those functions which collective bargaining contracts have properly 'entrusted to the arbitration tribunal.'" *Hines*, 424 U.S. at 562-63. If courts were not required to give deference to the tribunals chosen by the parties to the collective bargaining agreement, such plenary review by the courts "would make meaningless the provisions that the arbitrator's decision is final." *Id.* at 563.

*1. September 18, 2002 Grievance*

In support of summary judgment, Defendants argue that Clark's claims regarding his September Grievance are time barred. Clark does not offer any argument in opposition to Defendants' contentions. Claims for relief brought

under Section 301 of the LMRA are governed by a six-month statute of limitations. *DelCostello v. Int'l Brotherhood of Teamsters,* 462 U.S. 151, 172 (1983); *Craft v. Automotive, Petroleum & Allied Indus. Employees Union,* 754 F.2d 800, 803 (8th Cir. 1985). Furthermore, it is well settled that a cause of action for the breach of the duty of fair representation accrues when "the employee's grievance is finally rejected and his contractual remedies are exhausted." *Craft,* 754 F.2d at 803.

In this case, Clark has testified that he only recalls two occasions where he was required to perform a job other than his bid job as a sorter on the preload. (Clark Depo. pp. 129, 130, 133, 138). As stated earlier, the first of these was when Clark was told to unload on the morning of September 18, 2002. Clark's September Grievance did not include his termination for job abandonment, but merely the alleged violations of his seniority with regard to his bid job. The discharge, however, was considered at the meeting as part of the September Grievance. As a result of the grievance meeting, Clark was offered a two-day suspension, which included September 18, 2002, in exchange for the withdrawal of the September Grievance. (Clark Depo. pp. 36, 398, 401). While Clark was free to pursue the September Grievance to the MoKan panel, he agreed to the two-day suspension as a resolution of the grievance. (Clark Depo. pp. 398:4-14; 401:7-13).

It is undisputed that this action was brought before this Court on March 31, 2003 with filing of Plaintiffs' Complaint (Doc. 1). The statute of limitations that applies to Section 301 claims, therefore, bars any claims accruing prior to October 1, 2002. Thus, this Court finds that any claims brought under Section 301 by Clark against UPS and Local 41 arising from his termination and

reinstatement on September 18, 2002, are barred by the six-month statute of limitations. As a result, Defendants' motions for summary judgment on Clark's claims under Section 301 relating to the alleged violations of the CBA on September 18, 2002, and the Local 41's representation of him in conjunction with September Grievance are GRANTED.

*2. October 16, 2002 Grievance*

Clark has also alleged claims under Section 301 relating to his October 16, 2002, termination. As with Clark's claims relating to his September 18th termination, UPS and Local 41 have also moved for summary judgment, contending that Clark's claims fail as a matter of law. Again, Clark contends that there exists a genuine issue of fact for trial so as to preclude summary judgment.

In order to recover on a Section 301 claim, the plaintiff must not only prove that there was a violation of the collective bargaining agreement by the employer, but also that the union failed in its duty to represent the plaintiff. *Smith v. McDonnell Douglas Corp.*, 107 F.3d 605, 607 (8th Cir. 1997). If the plaintiff is unable to establish that the union has breached its duty, the breach of contract claims against the employer for violations of the collective bargaining agreement fail as a matter of law. *Hines*, 424 U.S. at 570-71 (stating that to prevent against either the company or the union, the plaintiff must not only show that the discharge was contrary to the contract, but must also "carry the burden of demonstrating breach of duty by the Union.").

Aside from the considerable burden placed upon a plaintiff bringing a Section 301 claim, the establishment of

a breach of the duty of fair representation is, in itself, an especially difficult task. *Smith,* 107 F.3d at 607. "A union will be found to have breached its duty of fair representation only when 'its conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.'" *Buford v. Runyon,* 107 F.3d 1199, 1202 (8th Cir. 1998). A union's decision on processing a grievance should not be deemed arbitrary unless it appears so unreasonable as to be "irrational". *Air Line Pilots Ass'n Int'l. v. O'Neill,* 499 U.S. 65, 78 (1991). Bad faith in the processing of grievance requires evidence of fraud, deceitful action, or dishonest conduct." *Baxter v. United Paperworkers Int'l. Union, Local 7370,* 140 F.3d 745, 747 (8th Cir. 1998). Also, discrimination with regard to a union's processing of a grievance requires a showing of "invidious discrimination" that is based on race, gender, or some other immutable characteristic, or "personal prejudice or animus" on the part of the union decisiomnaker. *Schwarz v. Brotherhood of Maint. of Way Employees,* 264 F.3d 1181, 1186 (10th Cir. 2001). Mere negligence, poor or mistaken judgment, or ineptitude are insufficient to establish a breach of the duty of fair representation. *Id.* Moreover, the Supreme Court has stated that "[a]ny substantive examination of a union's performance . . . must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities." *O'Neill,* 499 U.S. at 78.

In opposition to summary judgment Clark contends that he should be able to maintain his claims because he has presented substantial evidence of discrimination and bad faith by the union. Clark also contends that summary judgment is inappropriate because Clark has, at no time admitted the he either had been insubordinate or had

failed to respond to leaking packages. Clark has, however, admitted, that he did not answer any radio calls on the morning of October 16, 2002. (MoKan Transcript TL41 at 0060). Moreover, Clark has made this admission even though it was well established not only that Clark's radio was working on that morning, but also that he had been told to keep the radio with him so that he could respond to supervisors' calls. (Clark Depo. pp. 47:3-6; 50:12-15; 123:9-15). Clark has also stated that McMullin had to alert him in person to respond to a leaking package on about five occasions that morning. (Clark NLRB Affidavit at p. 6).

The main part of Clark's argument in opposition to summary judgment on his Section 301 claims is that "[n]umerous relevant records and other information were available to Local 41's business agents at the time that each grievance was filed, which would have demonstrated that Doyle Clark's terminations were discriminatory, retaliatory, and violated the Collective Bargaining Agreements (Doc. 373 at p. 441). After making this assertion, Clark submits to the Court pages of information that should purportedly have been presented by Local 41 at the grievance hearing. (Doc. 373 at pp. 441-449). At one point, Clark even contends that a jury could find that Local 41's investigation was "severely lacking" and a "considerable amount of important evidence" existed that should have been presented at Clark's grievance hearings. It is well settled that union representatives are not lawyers and, therefore, cannot be held to the same standard as attorneys with regard to their knowledge of the law in processing grievances. *Buford v. Runyon,* 160 F.3d 1199, 1203 (8th Cir. 1998). Notwithstanding the nature of these contentions, in light of the applicable standards of law with regard to Section 301 claims, this argument is incredibly

unpersuasive. This is especially true given that fact that Clark has admitted both that he was satisfied with his representation by the union at the MoKan panel hearing and that he was allowed to present all the evidence that he felt pertained to the case. (MoKan Transcript at p. 0062).

This Court finds that Clark has failed to show an issue of fact with regard to his claim that Local 41 breached its duty of fair representation in the processing of Clark's October Grievance. As a result, Clark's Section 301 hybrid claims against UPS and Local 41 fail as a matter of law. Accordingly, Defendants' motions for summary judgment on Clark's claims contained in Count II are GRANTED.

### B. Labor Management Reporting and Disclosure Act

In Count IV of Plaintiffs' First Amended Complaint, Clark asserts Local 41's conduct in processing his grievance constituted a violation of Section 101 of the LMRDA. In support of summary judgment, Local 41 asserts that Clark's claims for relief under the LMRDA fail as a matter of law because the statutory interests protected by the LMRDA do not include the harms which Clark has alleged. Moreover, Local 41 argues that Clark's inability to create a triable issue with regard to his Section 301 claim dooms his claims under LMRDA. This Court agrees.

The LMRDA sets forth a bill of rights for union members which protects their rights to assemble and speak freely at union meetings, promote or oppose candidates for union office, and otherwise opine on the business of the organization without punishment or retribution

from union leadership. 29 U.S.C. § 411(a)(2). The LMRDA, therefore, is designed to enhance participatory democracy in union affairs. *Wirtz v. Hotel Employees Union,* 391 U.S. 492, 497-98 (1968). As a result, the LMRDA is aimed solely at protecting the relationships between unions and their members and has no bearing upon other relationships. *Phelan v. Local 305,* 973 F.2d 1050, 1056 (2d Cir. 1992), *cert. denied,* 507 U.S. 972 (1993) (stating that the LMRDA does not afford subject matter jurisdiction to federal courts on suits between union members and their employers).

Clark has asserted that Local 41 has engaged in at least four patent violations of the LMRDA: (1) Local 41 failed to fairly represent Clark through his grievance process and, as a result, he was not reinstated; (2) Local 41 undertook no effort to assist Clark in finding other employment in the craft so he could maintain his union membership; (3) Local 41 president Keith Calvin attempted to expel Clark for failure to pay membership dues; and (4) Clark was falsely and frivolously prosecuted before the Teamsters Joint Council 56. This Court finds that Clark has failed to prove a genuine issue of fact remains for trial that would allow him to maintain his claims for relief under the LMRDA.

First, Clark contends that his rights under the LMRDA were violated because Local 41 mishandled the processing of his grievances in retaliation for his union activities. These assertions contain, in essence, the substance of Clark's claims against Local 41 under Section 301. This Court finds no reason to revisit those issues. Having found above that Clark was unable to present a triable issue of fact with regard to his claim that Local 41's breached its duty of fair representation in processing his grievances, any claims based on that representation

brought under the LMRDA must also fail as a matter of law.

Second, Clark asserts that Local 41 violated his rights under the LMRDA because it undertook no effort to assist him in finding other employment in the craft following his termination from UPS. In support of his claim, Clark offers no precedent that shows Local 41 had such an affirmative duty under the LMRDA. Fundamentally, such a duty seems inconsistent with the LMRDA's prophylactic nature. As stated above, the LMRDA is designed to protect the rights between union members to freedom of expression without fear of sanctions by the union. *Finnegan v. Leu*, 456 U.S. 431, 435 (1982). Moreover, the LMRDA applies only to the context of the relationship of a union and its members, and not to any other relationships. *Phelan,* 973 F.2d at 1056. As such, Clark's assertion that Local 41 did not aid him in finding alternative employment in the craft after his termination from UPS fails to demonstrate a genuine is [sic] of fact with regard to LMRDA claim.

Third, Clark attempts to maintain his claims under the LMRDA against Local 41 by asserting that Local 41 president Keith Calvin tried to have Clark expelled for failing to pay his membership dues. While Clark maintains that the delinquency of his dues was the result of "severe financial difficulties" experienced subsequent to his termination from UPS, the contention that this forms the basis of an [sic] claim for relief under LMRDA is utterly ridiculous. This is especially true given the fact that absolutely no disciplinary action was taken against Clark. Clark does not dispute that, at some point, he failed to keep up with the payment of his membership dues. More striking, however, is that Clark himself acknowledges that

he tendered all dues to Local 41 in full. (Doc. 373 at 472). Apparently, his claim is that Local 41 has violated his rights under the LMRDA for making him pay his dues. The LMRDA specifically provides that nonpayment of dues is a valid reason for the imposition of fine, suspension, or expulsion. 29 U.S.C. § 411(a)(5). This Court finds that Local 41 was well within its rights provided by the LMRDA to enforce the payment of membership dues and that Clark was not punished in conjunction with nonpayment of his dues. Thus, Clark has no claims under the LMRDA for the enforcement of the payment of membership dues.

Finally, Clark argues that he has a valid claim under the LMRDA because internal charges were brought against Clark at hearing before the Teamsters Joint Council 56. The charges, which were for misuse of union funds and nonparticipation in union events, were dismissed after the hearing, where Clark was allowed to read a statement in his defense. (Doc. 373 at 472). Clark claims that the charges were false and frivolous and should have been dismissed prior to the hearing. Clark, however, has been unable to establish the most important requirement necessary for the maintenance of an LMRDA claim: that he was actually disciplined. To state a claim for relief, a plaintiff is required to demonstrate a "direct interference" with rights provided by the LMRDA. *Franza v. Intn'l Brotherhood of Teamsters, Local 671,* 869 F.2d 41, 47 (2d Cir. 1989). It is undisputed that Clark has continued to hold office throughout this litigation and has been deprived of no rights or benefits afforded by the LMRDA. Surely Clark cannot escape the irony that, while he asserts that the charges brought him against him were a violation of his rights under the LMRDA, it was his ability

to freely exercise those rights at the Joint Council 56 hearing that allowed him to successfully defend himself. Thus, Clark's contention that the charges brought against him at the Joint Council 56 should have been dismissed without a hearing fails create an issue for trial on his claim for relief under the LMRDA.

Accordingly, Local 41's motion for summary judgment on Clark's claim for relief for violations of his rights under the LMRDA is GRANTED. As a result, all claims for relief asserted by Clark under the LMRDA contained in Count IV of the First Amended Complaint are DISMISSED.

### C. Age Discrimination

In Count V of his First Amended Complaint, Clark has alleged disparate treatment age discrimination under the ADEA against UPS. The ADEA makes it "unlawful for an employer . . . to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). Everyone forty years or older is considered within the protected class and protected under this Act. *Id.* As stated, Clark was 43 years old at the time of his termination from UPS.

The Eighth Circuit has determined that in the absence of "direct evidence" of age discrimination by the Defendant, the analytical framework established in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), is appropriate in ADEA claims. Clark has urged the Court to apply the mixed motive analysis from *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989), contending that he has demonstrated direct evidence of discrimination based upon

his age. The framework set forth in *Price Waterhouse,* as modified by Section 107 of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m), is applied when an employee has put forth direct evidence that "an illegal criterion such as age [], was used in the employer's decision to terminate." *Breeding v. Arthur J. Gallagher and Co.,* 164 F.3d 1151, 1156 (8th Cir. 1999). Under the *Price Waterhouse* analysis, upon a showing of direct evidence of discrimination, an employer is liable for an unlawful employment practice when an [sic] the plaintiff demonstrates that "an illegitimate criterion was a motivating factor in the adverse employment action, even though other factors also motivated the action." *Browning v. President Riverboat Casino Missouri, Inc.,* 139 F.3d 631, 634 (8th Cir. 1998). If direct evidence of discrimination is demonstrated, the defendant may attempt to limit the relief the plaintiff is entitled to by showing that it would have made the same decision regarding employment even in the absence of the discriminatory motive. *Id.*

For purposes of the *Price Waterhouse* analysis, "direct evidence" is "conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude . . . sufficient to permit the factfinder to find that attitude was more likely than not a motivating factor in the employer's decision." *Thomas v. First Nat'l Bank,* 111 F.3d 64, 66 (8th Cir. 1998) (quoting *Kriss v. Sprint Comm. Co.,* 58 F.3d 1276, 1282 (8th Cir. 1995)). It is clear, however, that "not all comments that reflect discriminatory attitude will support an inference that an illegitimate criterion was a motivating factor in an employment decision." *Radabaugh v. Zip Feed Mills, Inc.,* 997 F.2d 444, 449 (8th Cir. 1993). The Supreme Court has held that "stray remarks in the

workplace," "statements by nondecisiommakers," and even "statements by decisionmakers unrelated to the decisional process itself" are insufficient to constitute "direct evidence" for the purposes of the mixed motive analysis. *Price Waterhouse,* 490 U.S. at 277.

This Court finds that Clark has not demonstrated based upon any competent or admissible evidence that this case merits the *Price Waterhouse* analysis. While Clark attempts to paint the picture of a grand conspiracy in which Johnson and McMullin put forth a concerted effort to terminate Clark for discriminatory reasons, he has presented no evidence that Johnson, in making the decision to terminate Clark, considered illegitimate criteria. The thrust of Clark's argument comes from statements purportedly uttered by McMullin with regard to Clark's termination. Gary Jones claims to have heard McMullin state, among other things, that he was brought to Lenexa by Johnson to "get rid" of older union members, including Clark, purportedly base on their seniority. (Gary Jones Depo. pp. 45:2-46:3; 64:13-19; 154:24-155:15). This evidence, however, is insufficient to merit the *Price Waterhouse* analysis, because, without the overt speculation of the witness who allegedly heard these comments, they cannot be shown to be related to Johnson's decision with regard to Clark's termination. Moreover, Clark himself has admitted that he never heard negative age-based comments from Johnson. (Clark Depo. p. 154:1-6). Accordingly, this Court finds that Clark has not presented direct evidence of age-based discrimination that would require the analysis of his claim for age discrimination under the framework set forth by the Supreme Court in *Price Waterhouse* and, as a result, his claim will be analyzed under the *McDonnell Douglas* framework.

The *McDonnell Douglas* test envisions a burden shifting analysis which allows inferences of discrimination to be drawn based on circumstantial evidence. The purpose of such an analysis is to counteract the shrewd employer who in fact discriminates in employment, yet leaves no "smoking-gun" as evidence of such activities. *Rothmeier v. Inv. Advisers, Inc.*, 85 F.3d 1328, 1332 (8th Cir. 1996). As stated above, Clark has offered no direct evidence of discriminatory intent by UPS and, thus, the Court will analyze this case under the *McDonnell Douglas* framework.

Under this framework, a plaintiff must first establish a prima facie case of age discrimination. *Id.* at 1332. To establish a prima facie case in an age discrimination claim, the Plaintiffs have the burden of persuasion and production to demonstrate that they: (1) belong to a protected group (over the age of 40); (2) performed job duties at a level that met the employer's legitimate expectations; (3) suffered an adverse employment action; and (4) after the adverse employment action the position(s) was kept open or filled by a substantially younger employee. *Calder v. TCI Cablevision of Missouri Inc.*, 298 F.3d 723, 729 (8th Cir. 2002).

After establishing this prima facie case, a rebuttable presumption of unlawful discrimination arises. *Rothmeier,* 85 F.3d at 1332. At this point the burden of production, but not the burden of persuasion, shifts to the defendant to articulate some legitimate, non-discriminatory reason for the adverse employment action. *Id.* If the defendant is able to carry this burden of producing admissible evidence of a non-discriminatory reason for the adverse employment action, then the presumption raised by the prima facie case is rebutted and "drops" from the case. *Id.*

The burden of production then shifts back to the plaintiff for the third and final stage of the analysis. At this stage, the *McDonnell Douglas* framework resolves into the ultimate question facing a trier of fact in any disparate treatment suit; whether the employer engaged in intentional discrimination. *Id.* at 1334-35. This "refocused" and "specific" inquiry must discover whether the proffered reasons for the employer's action were actually a pretext for discriminatory animus. *Id.* at 1332. However, in all practicality, this inquiry must be resolved in two parts. *See id.* at 1336-37.

First, the plaintiff must demonstrate that the employer's proffered reason was merely pretextual; that is, it was not the true reason for the employer's action. *Id.* at 1335. In the summary judgment context, this means the court must find that the plaintiff has "presented sufficient evidence for a jury to disbelieve the reasons proffered by the employer." *Id.* In other words, the plaintiff must present evidence which creates a genuine factual dispute as to the issue of whether the reasons proffered by the defendant are pretextual. However, even if the court is convinced that a reasonable jury could find that the proffered explanation for the adverse employment decision is pretextual, the court may nevertheless "decide as a matter of law that the evidence is insufficient for a reasonable jury to infer age discrimination and therefore may grant summary judgment to the employer." *Id.* at 1335. Therefore, the final barrier a plaintiff must overcome in this analysis is demonstrating unlawful discriminatory intent. Simply creating a factual dispute as to the veracity of the defendant's proffered explanation for the adverse employment action is insufficient to avoid summary judgment. The court must be convinced that a reasonable

jury could ultimately infer that age was a determinative factor in the employer's decision. *Id.* at 1334, 1336-37. Pretext alone is not enough, instead, the showing must be that the explanation is pretext for age discrimination.

This is a fact sensitive inquiry. In some cases the overall strength of the prima facie case, in conjunction with the evidence of pretext, may be sufficient to permit an inference of intentional discrimination. *Id.* at 1334-35. In other cases such evidence may not be sufficient to prove age discrimination and the plaintiff must offer additional evidence of the discriminatory intent of the employer. *Id.* Everything depends on the individual facts of the case and the court must vigilantly recall that the plaintiff bears the ultimate burden of demonstrating a genuine factual dispute as to whether the defendant intentionally discriminated in its employment decisions on the basis of the plaintiff's age.

*1. Legitimate Expectations of Performance*

In support of summary judgment, UPS contends that Clark is unable to establish a prima facie case for age discrimination. Specifically, UPS contends that Clark cannot demonstrate a genuine issue of material fact with regard either to the second element, that he was performing his job at a level that met the legitimate expectations of his employer, or to the fourth element, that employees under the age of 40 were treated more favorably. In the Eighth Circuit, the standard for assessing an employee's performance is what the employer could legitimately expect from the employee. *Calder,* 298 F.3d at 729 (citing *Keathley v. Ameritech Corp.,* 187 F.3d 915, 920 (8th Cir. 1999). An employee's ability to meet some expectations of the

employer does not satisfy the standard if other, significant expectations are not met. *Ziegler v. Beverly Enterprises-Minnesota, Inc.,* 133 F.3d 671, 676 (8th Cir. 1998). An employer has a legitimate expectation that its employees will not be insubordinate in the performance of their duties. *Miner v. Bi-State Dev. Agency,* 943 F.2d 912, 913 (8th Cir. 1991).

Inexplicably, the argument section of Clark's suggestions in opposition to summary judgment, attempts to gloss over the issue of whether he was performing at a level that met UPS' legitimate expectations, by stating conclusively that "set forth above, there is disputed evidence that Doyle Clark was qualified to do his job and was performing his job satisfactorily." (Doc. 373 at p. 375). Considering that document's blatant and extreme noncompliance with this Court's local rules, such an underwhelming argument on an issue as important as an element of the prima facie case is almost as remarkable for its supremely presumptive nature as it is for its ineptitude. The expectation that this Court would wade through the deluge of briefing supplied by Clark in opposition to summary judgment, without so much as a cross-reference, in an effort to piece together his argument that there exists a genuine issue of fact for trial is further evidence of the Plaintiffs' willingness to engage this Court with fantasy and fiction rather than fact and law. This is especially true in light of the fact that Clark has openly admitted at the MoKan panel hearing that he never responded to a single radio call on the morning of October 16, 2002. (MoKan Transcript TL41 at p. 0058 & 0060). Moreover, it is undisputed that, on at least five occasions that morning, McMullin was forced to go and find Clark to

tell him to respond because he was not answering his radio. (Clark's NLRB Affidavit at p. 6).

This Court finds that Clark has failed to demonstrate genuine issue of material fact exists for trial with regard to whether he met the legitimate expectations of his employer. As a result, Clark is unable to establish a prima facie case for age discrimination. Accordingly, UPS' motion for summary judgment on Count V of the First Amended Complaint is GRANTED and Clark's claim for age discrimination under the ADEA is DISMISSED.

### D. Title VII Discrimination and Harassment

In Count VI, Clark has also brought claims against UPS that allege he was discriminated against and harassed based on his race in violation of Title VII. UPS argues that these claims of racial discrimination fail as a matter of law. Title VII prohibits an employer from discriminating against an employee with respect to his compensation, terms, or conditions of employment on account of his race, color, religion, sex, or national origin. 42 U.S.C. § 2000e, *et seq.*

#### *1. Discrimination Base on Race*

Again, Clark has urged the Court that there is direct evidence of racial discrimination and, as a result, his claims merit analysis under the *Price Waterhouse* framework. In support of this proposition, Clark argues that racial animus of Johnson and McMullin, comments and disparate treatment of Clark and other African American employees, and evidence that Clark was intentionally targeted for termination by Johnson and McMullin merit the mixed motive analysis. This Court remains unconvinced. As stated above

in this Court's discussion of Clark's claims under ADEA, the Supreme Court has held that "stray remarks in the workplace," "statements by nondecisionmakers," and even "statements by decisionmakers unrelated to the decisional process itself" are insufficient to constitute as "direct evidence" for the purposes of the mixed motive analysis. *Price Waterhouse,* 490 U.S. at 277.

While Clark again attempts to build the foundation of his assertions of direct evidence of racial discrimination on an elaborate conspiracy involving UPS managers Johnson and McMullin, he cannot escape his own statements which belie this fantastic theory for the mere fabrication that it is. No matter how many allegedly factual assertions that Clark attempts to unload upon these proceedings under the guise that they are indeed relevant and admissible pieces of evidence, he cannot overcome the fact that he himself has admitted that he has never heard either Johnson or McMullin utter any racist comments. (Clark Depo. p. 155:23-156:3). Nor can Clark bury under a mountain of irrelevant and inadmissible assertions the fact that he has no evidence that Johnson, the decisionmaker with regard to both of the terminations at issue, ever uttered anything that could constitute direct evidence of racially discriminatory animus with regard to either of those decisions.

In the absence of direct evidence, claims of discrimination based on race brought under Title VII are also analyzed under the well-worn *McDonnell Douglas* burden shifting framework. *Griffith v. Des Moines,* 387 F.3d 733, 736 (8th Cir. 2004). Again, the plaintiff must first establish a prima facie case of discrimination based race. *Griffith,* 387 F.3d at 736. Once the plaintiff makes out his prima facie case, a presumption of discrimination arises and the

burden of production shifts to the defendant to put forth evidence that the defendant's actions were based on legitimate, non-discriminatory reasons. *McDonnell Douglas,* 411 U.S. at 802. If the defendant proffers such evidence, the burden shifts to the plaintiff to produce evidence demonstrating that the defendant's stated reasons are pretext for discrimination. *Griffith,* 387 F.3d at 736-37. Notwithstanding the burden-shifting of the *McDonnell Douglas* framework with regard to production, at all times, the burden of persuasion remains with the plaintiff. *Gagnon v. Sprint Corp.,* 284 F.3d 839, 847 (8th Cir. 2002).

In order to make out a prima facie case of racial discrimination under Title VII, Clark must show that (1) he was a member of a protected group; (2) he was meeting the legitimate expectations of his employer; (3) he suffered an adverse employment action; and (4) similarly situated employees, who are not members of the protected group, were treated differently. *Clark v. Runyon,* 218 F.3d 915, 918 (8th Cir. 2000). Clark was subject to termination twice in 2002, once on September 18th, which resulted in suspension and reinstatement, and a final time on October 16th. Those are the only adverse employment actions that are at issue in this case. This Court will analyze each termination separately.

*a. Clark's September 18, 2002 Termination*

In support of its motion for summary judgment, UPS contends that Clark cannot establish a prima facie case of race discrimination for his September 18, 2002 termination because he is unable to demonstrate that he was meeting the legitimate expectations of his employer, which

is the second element of the prima facie case. Clark opposes this by simply recounting the facts surrounding his termination that morning and stating that he has indeed established a prima facie case for race discrimination. At no point does Clark's argument even directly address UPS' assertion that his performance did not meet the legitimate expectations of his employer.

The standard to be applied when assessing an employee's performance is not that of an ideal employee, but rather the performance that an employer could legitimately expect. *Keathley v. Ameritech Corp,* 187 F.3d 915, 920 (8th Cir. 1999). Even when taken in the light most favorable to Clark, it is undisputed that he left work without clocking out at some time around 4:00 a.m. on the morning of September 18, 2002 and did not return until 10:15 a.m., over six hours later. (Clark Depo. pp. 18-23). On that morning, Clark reported to work at 3:45 a.m. The UPS manager on site, Lydick, instructed Clark to unload a trailer. (Clark Depo. p. 18:1-4). Clark felt that this order was a violation of his seniority and informed Lydick of this. (Clark Depo. p. 18:5-11). According to Clark, Lydick told him that if he did not want to unload, that he would not work at all. (Clark Depo. p. 18:12-14). After being told that, Clark searched for a union steward and, when he could not locate one, he went to the time clock and attempted to punch out. (Clark Depo. p. 20:14-25). While Clark contends that the time clock was malfunctioning and did not allow him to clock out, the fact remains, by his own admission no less, that he neither clocked out before he went home nor told anyone that the time clock was malfunctioning. (Clark Depo. pp. 21:9-13; 393:16-394:14) It is undisputed that Clark did not speak with a union steward before leaving and did not ask for permission

before he left. (Clark Depo. pp. 392:17-393:7). Upon his return to work he was terminated for job abandonment.

These facts, which come straight from Clark himself, when taken in the light most favorable to Clark, unequivocally demonstrate that there is no genuine issue of material fact with regard to whether he was performing up to the legitimate expectations of his employer. The fact alone that Clark refused to accept an assignment and instead chose to go home would be sufficient in itself to demonstrate that he was not performing to the legitimate expectations of UPS. What is beyond comprehension, however, is his attempt to bring this claim in face of own admission that he did not clock out when he left that morning and did not alert anyone to fact that he did not clock out. This outrageous claim becomes even more glaringly inconsistent with his own story when one takes into account Clark's purported reason for leaving work that morning. He claims that he did not want "to be accused of stealing time". (Clark Depo. p. 20:17-21).

This Court finds that Clark has failed to establish a genuine issue of fact with regard to the second element of his prima facie case for discrimination based on race relating to his termination on September 18, 2002, because Clark cannot demonstrate that his performance was meeting the legitimate expectations of UPS. Thus UPS' motion for summary judgment on this claim is GRANTED and Clark's claim for relief contained in Count VI, relating to his termination on September 18, 2002, is hereby DISMISSED.

*b. Clark's October 16, 2002 Termination*

Less than one month after Clark's termination on September 18, 2002 that resulted in a two-day suspension, Clark was terminated on October 16, 2002, for insubordination. Once again, in support of its motion for summary judgment on this issue, UPS asserts that Clark is unable to establish a prima facie case for race discrimination because he is unable to show that he was meeting the legitimate expectations of his employer. Clark counters by asserting that he has indeed demonstrated an issue of fact with regard to the prima facie case because he was satisfactorily performing his duties on October 16, 2002. This Court finds that the evidence does not support this assertion.

As with this Court's discussion of Clark's September 18, 2002 termination, this analysis need not proceed any further than Clark's own testimony in order for it to become clear that Clark is unable to demonstrate an issue of fact with regard to his prima facie case. As stated above, the standard applied is not the performance of an ideal employee, but merely the performance which an employer could legitimately expect. *Keathley,* 187 F.3d at 920. When taken in the light most favorable to Clark, he cannot overcome his many admissions that he did not respond to calls on the radio. While Clark's own story and, in fact, some of the other evidence he offers in support of his claim, is contradictory, this is clearly insufficient to create a genuine issue of fact for trial. *See O'Bryan v. KTIV Television,* 64 F.3d 1188, 1191 (8th Cir. 1995) (stating that a plaintiff's reliance on their own self serving affidavits is insufficient to issues of the material facts which are alleged).

It is undisputed that, during the preload shift on which Clark was working the morning of October 16, 2002, there is one person who is assigned as a hazmat responder. The responder on the preload was required to use a radio so that managers could alert the responder about leaking packages and spills in the building. While this practice was different than it was for hazmat responders on the day sort, when Clark normally served as a responder, Clark was aware and informed of this practice on the morning of October 16, 2002. (Clark Depo. p. 47:3-48:9). The necessity of the preload hazmat responder carrying a radio was due to fact that, unlike the day sort, there was not a supervisor specifically assigned to dispatch the responders. (Clark Depo. p. 48:4-9).

Clark argues that "he responded promptly and appropriately to every spill of which he was made aware" and that he "answered at least one call on the radio" and responded immediately. (Doc. 373 at p. 368). Clark's own statements, however, do not support these assertions. Twice at his grievance hearing before the MoKan panel, Clark admitted that he did not answer any calls on the radio that morning. (MoKan Transcript pp. 0058 & 0060).

Accordingly, this Court finds that Clark has failed to establish a genuine issue of fact with regard to the second element of his prima facie case for discrimination based on race relating to his termination on October 16, 2002, because he cannot demonstrate that his performance was meeting the legitimate expectations of UPS. As a result, UPS' motion for summary judgment on this claim is GRANTED and Clark's claim for relief contained in Count VI, relating to his termination on October 16, 2002, is hereby DISMISSED.

*2. Hostile Environment Harassment Based on Race*

Clark has also has [sic] asserted a claim against UPS that he was subjected to a hostile work environment based on his race in violation of Title VII. In support of its motion for summary judgment, UPS contends that Clark is unable to establish a genuine issue of material with regard to this claim. Having considered the evidence, especially the statements of Clark himself, this Court agrees.

Title VII also offers protection to employees from harassment based upon race, color, religion, sex, or national origin. *Palesch v. Missouri Comm'n on Human Rights*, 233 F.3d 560, 566 (8th Cir. 2000). Hostile work environment harassment occurs when "the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). In order to maintain an actionable harassment claim under Title VIII, not only must the environment be objectively hostile or abusive, but the victim must also subjectively perceive the environment to be abusive. *Harris,* 510 U.S. at 21-22 (citing *Mentor Savings Bank, FSB v. Vinson,* 477 U.S. 57 (1986)).

In this case, there are countless assertions made by Clark himself in the course of his deposition that convincingly demonstrate the absence of a genuine issue of fact for trial with regard to the subjective requirement of a Title VII harassment claim. According to Clark, his troubles with UPS management stem not from his race, but from his activity's with the union. In fact, Clark has

characterized his experience at the Lenexa facility prior to September of 2002, which was the start of his involvement with the union campaign, as "two years of wonderful cooperation". (Clark Depo. pp. 339:20-340:10). Moreover, Clark has stated that, prior to his involvement with union campaign, that he had a good relationship with the management at UPS. (Clark Depo. p. 340:11-21).

In spite of his own assertions, Clark's opposition to summary judgment baldly asserts that Jeff Johnson and Mike McMullin were known racists. This contention, however, is made even though Clark has admitted that he has never heard any racist comments uttered by either Johnson or McMullin. (Clark Depo. p. 155:23-156:3). As support for his accusations of racial animus, Clark relies solely on the basis of allegedly racists comments made in the presence of other African American UPS employees. These allegations, however, are completely irrelevant to Clark's claims for racially motivated harassment, because Clark can in no way claim to have personal knowledge of these actions. Because of the subjective component the is [sic] required in Title VII harassment claims, a court's consideration must be restricted to incidents to which a plaintiff claims to have personally suffered. *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 795 (8th Cir. 2004). In light of Clark's own statements with regard to his experiences at UPS' Lenexa facility, this Court finds that his claims for hostile work environment are completely baseless.

Accordingly, this Court finds that Clark has failed to establish a genuine [sic] of material fact trial with regard to the subjective requirement of his Title VII harassment/hostile work environment claim. Thus, UPS' motion for summary judgment on that claim is GRANTED. As a

result, Clark's claim for harassment/hostile work environment based on race in violation of Title VII contained in Count VI is hereby DISMISSED.

## V. Conclusion

For the forgoing reasons, this Court finds that Doyle Clark has failed to demonstrate a genuine issue of material fact with regard to any of his claims for relief contained in the First Amended Complaint. Accordingly, UPS' motion for summary judgment directed towards Doyle Clark's claims (Doc. 318) and the portions of Local 41's motion for summary judgment (Doc. 310) that are applicable to Doyle Clark's claims are hereby GRANTED. As a result, all claims for relief sought by Doyle Clark in the First Amended Complaint are hereby DISMISSED.

**IT IS SO ORDERED.**

/s/ Gary A. Fenner
GARY A. FENNER, JUDGE
United States District Court

DATED: **April 7, 2005**

2005 WL 1009572

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF MISSOURI**
**WESTERN DIVISION**

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| **STEPHEN E. JONES and DOYLE CLARK,** | ) | |
| **Plaintiffs,** | ) | |
| **vs.** | ) | **Case No. 03-0284-CV-W-GAF** |
| **UNITED PARCEL SERVICE, INC., and LOCAL 41 OF THE INTERNATIONAL BROTHERHOOD TEAMSTERS,** | ) | |
| **Defendants.** | ) | |

**ORDER**

(Filed April 7, 2005)

## I. Introduction

Presently before the Court are motions for summary judgment on the claims of Plaintiff Stephen E. Jones ("Jones") submitted by Defendants United Parcel Service, Inc. ("UPS") (Doc. 319) and Local 41 of the International Brotherhood of Teamsters ("Local 41") (Doc. 310)[1] (collectively as "Defendants"). Jones has asserted several claims against both Defendants. In his First Amended Complaint, Jones alleges that UPS violated the collective bargaining agreement between UPS and Local 41 in violation of

[1] Local 41's motion for summary judgment (Doc. 310) deals with the claims submitted against it by both Plaintiffs in this case. This order deals exclusively with the facts and arguments in that document that pertain to Plaintiff Jones.

Section 301 of the Labor Management Relations Act, 29 U.S.C. § 141 *et seq.* ("LMRA"), discriminated against him and discharged him based on his age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 601, *et seq.* ("ADEA"), the Kansas Age Discrimination in Employment Act, K.S.A. § 44-1110, *et seq.* ("KADEA") and the Missouri Human Rights Act, Mo. Rev. Stat. § 213.010 *et seq.* ("MHRA"). In addition to his claims against UPS, Clark asserts that Local 41 breached its duty to fairly represent him under Section 301 of the LMRA, violated his rights as a union member granted by Section 101 of the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 411 ("LMRDA"), and discriminated against him based upon his age in violation of the ADEA, KADEA, and MHRA. Jones has opposed this motion. For the following reasons, Defendants' motions are hereby GRANTED.

## II. Facts

This Court must note before proceeding to its finding of fact that, due to many egregious misrepresentations of fact and violations of the Federal Rules of Civil Procedure and the Local Rules of this Court, both the Statement of Controverted Facts ("Fact Statement") and the Responses to Defendants' Statements of Fact ("Responses") submitted in Plaintiffs' Memoranda in Opposition to Defendants' Motions for Summary Judgment (Doc. 373) have been disregarded by this Court in its order pertaining to Defendants' motions for summary judgment on the claims submitted by Plaintiff Doyle Clark ("Clark"). (Doc. 506). While this Court finds it unnecessary to recount its lengthy discussion regarding the dilatory and fallacious nature of Plaintiffs' Fact Statement and Responses rendered in Doc. 506, for the purpose of clarity this Court

references that discussion in finding that all facts submitted by Defendants in support of their motions for summary judgment on Jones' claims are deemed admitted.

A. Background on Union Procedure

In 2002, the collective bargaining agreement ("CBA") between UPS and Local 41 consisted of three documents: (1) the National Master United Parcel Service Agreement; (2) the Central Region Supplement Agreement with appended memoranda of agreement; and (3) the Local Rider. Under the terms of the CBA, an employee who believes that he has been disciplined unfairly may have a union steward or business agent file on his behalf a grievance challenging the disciplinary action. The CBA expressly states that employees may be suspended or terminated for just cause. In addition to specifically enumerated offenses that warrant an employee's termination, the CBA provides for termination for "other serious offenses" which has been applied to situations involving job abandonment, failure to follow instructions, and insubordination.

If an employee who is covered by the CBA believes that UPS has somehow violated the employee's rights under the CBA, there are several potential steps involved in seeking a remedy. The employee must first pursue that matter by having a steward or business agent file a grievance on the employee's behalf. It is undisputed that, unless UPS' direction involved something immoral, illegal, or unsafe, the usual practice in regard the filing of grievances was for the employee to perform the work assignment that they believe violated that CBA and file a grievance after his shift. After filing a grievance, representatives of both

Local 41 and UPS would meet to discuss the matter in an informal hearing.

Any matter that cannot be resolved by an informal hearing would require the representatives from Local 41 and UPS hold a more formal proceeding, known as a local hearing. The employee who filed the grievance would normally attend the local hearing and the positions of each side would be outlined with statements based on personal knowledge offered in support. If no disposition of the matter agreeable to both sides could be reached, the matter could be referred to a two-state Missouri-Kansas ("MoKan") panel.

Meeting on a monthly basis, the MoKan panel considers deadlocked disciplinary grievances and certain deadlocked contract-interpretation grievances from Teamsters Locals located in Missouri or Kansas. The MoKan panel consists of an equal number of representatives from the Teamsters Union and UPS. Common practice prohibits a Teamster representative from hearing a grievance filed by an employee from the Local that he is from. Likewise, UPS representatives may not sit on a panel determining matters relating to a grievance filed out of the center to which that UPS representative is assigned.

At a MoKan panel disciplinary hearing, UPS bears the burden of proof and presents its case first, usually by having the manager involved in the employment action outline the circumstances surrounding the disciplinary action. Witnesses may be called and evidence may be offered, including written statements from other managers or supervisors who witnessed relevant events. Next, the local union, represented by a business agent, will present its case in support of the grievance. Like UPS, the local

union is allowed to call witnesses and offer evidence. Both sides are afforded the opportunity to respond to the other. After all the evidence is presented and the MoKan panel has had opportunity to question the representatives, the employee who filed the grievance, and any of the witnesses. The panel then debates the grievance in a closed meeting before orally announcing its determination. If the MoKan panel is unable to reach a decision on the grievance, the matter may be taken to the Joint Area Committee which draws its committee members from a wider geographical area than the MoKan panel.

B. Stephen Jones' Employment with UPS

Stephen Jones was born on September 18, 1954 and was 48 years old when he was discharged from UPS on November 12, 2002. Jones was hired in 1975 and began working as a feeder (tractor-trailer) driver in 1984. (Jones Depo. at p. 12:20-22). He started working at UPS's Lenexa, Kansas facility ("Lenexa") in 1985. (Jones Depo. at pp. 12:23-13:1). Jones was a member of Local 41 and served as the head union steward for the Lenexa Feeder Department from January of 2000 until his termination in November of 2002. (Jones Depo. at p. 20:20-23).

Every feeder driver at UPS has a bid job pursuant to the contract with a specific start time, destination and job duties. (Jones Depo. at p. 44:7-10). As a result, feeder drivers do not bid on specific loads. (Jones Depo. at p. 44:11-13). At Lenexa, some drivers haul loads between UPS locations in different cities and other drivers make local deliveries and pick up packages from larger customers. During 2001 and 2002, Jones would drive a bid route from Lenexa to Wichita, Kansas on five nights a week,

Monday through Friday. (Jones Depo. at pp. 13:12-15; 15:14-19; 16:4-13). This route, titled LW16 ("Wichita Route"), began at 8:30 p.m. (Jones Depo. at p. 15:2-4).

Certain feeder bid jobs are called "cover jobs" because the drivers who have those jobs cover for absences, vacations, overflow work, volume fluctuations, unexpected customer needs, extra routes which need to be driven on a given day, and other feeder work. These drivers are referred to as "cover drivers". Other than cover drivers, UPS does not have a pool of unassigned feeder drivers that can be used to fill routes that are open due to absences. At certain times, UPS does have enough cover drivers to handle all the open routes on a given day. When this occurs, UPS can reassign a driver from his route or other job and use that driver to cover an open route. If a driver who does not have a cover job as his bid is used to cover an open route, that driver's route must either be covered by another employee or eliminated outright.

UPS has the right to cut a feeder drivers route on any given day. UPS has the right to cut a feeder driver's route for various reasons which include volume fluctuations or using the driver to cover another route. If a feeder driver's route is cut, the driver is deemed to be unassigned and, therefore, must work as directed, unless the driver is offered by management to take the day off without pay.

*1. Feeder Driver Grievances Filed by Jones*

During 2001 and early in 2002, Jones, in his capacity as a Local 41 union steward, filed several grievances on behalf of other UPS drivers who alleged that UPS was transporting loads by using subcontractors, which was a violation of the CBA. The substance of these grievances

was that UPS' use of subcontractors was adversely affecting UPS feeder drivers, some of whom Jones claimed had been laid off or bumped from their routes. (Jones Depo. at pp. 269:6-273-4). During 2000 and 2001, Jones did not claim that any of his routes had been taken by subcontractors. (Jones Depo. at p. 268:11-16). The subcontracting grievances submitted by Jones on behalf of other drivers were presented at local grievance meetings by Local 41, where UPS denied there was a violation of the CBA. Local 41 then appealed these grievances to the MoKan panel in August of 2002. The MoKan panel, however, deadlocked on the issue, which was then docketed for the National panel. Local 41, however, withdrew the grievances before they were heard at the National panel.

Also in his capacity as a steward, in 2001 and 2002 Jones filed grievances on behalf of feeder drivers claiming that UPS was pulling them off of their regular bid jobs so that they could be used as cover drivers. (Jones Depo. p. 73:1-19). In the grievances, filed in August of 2001 and April and June of 2002, Jones asserted that UPS did not have enough cover drivers to handle all of the absences, vacancies, and extra routes at the Lenexa facility and demanded that UPS stop forcing drivers off of their bid routes. (Jones Depo. pp. 73:1-19; 78:12-25; p.81:23-83:3). Jones was not personally taken off of his route in either 2001 or the first six months of 2002. (Jones Depo. pp. 73:15-19; 79:4-12). According to Jones, his Wichita Route was never eliminated prior to July of 2002. (Jones Depo. p. 32:3-19).

Again, between March and July of 2002, Jones filed grievances on behalf of feeder drivers claiming that UPS was violating the CBA by using "sleeper teams" to transport trailers and loads from Lenexa to Dallas, Texas. At

the time that Jones filed these grievances, his Wichita Route had not been cut. (Jones Depo. p. 32:14-19). UPS admits that, since 1998, it had used sleeper teams occasionally to take loads or trailers from Lenexa to Dallas and that those sleeper teams would pull empty trailers between Lenexa and Dallas mostly on Fridays. Prior to the filing of these grievances, UPS District Labor Manager, Al Gudim ("Gudim"), and Feeder Manager, Jeff Saylors ("Saylors"), had each separately spoken with a representative of the National Teamsters/UPS Article 43 Committee ("Article 43 Committee"), Harold McLaughlin ("McLaughlin"), about authorizing sleeper teams that were hauling empty trailers to Dallas to take loads as well. The Article 43 Committee has jurisdiction over sleeper team issues under the CBA.

*2. Jones' Sleeper Team/Bid Elimination Grievances*

Jones' Wichita Route was not eliminated prior to July of 2002. (Jones Depo. p. 32:14-19). Between July and November of 2002, Jones' Wichita Route was cut on approximately 12 or 13 occasions. The decisions to cut Jones' route on particular days were made by Lavell White ("White"), as dispatch manager, and Scott Wetchensky ("Wetchensky"), as dispatch supervisor. These cuts were either due to decreased volume on his route or the necessity of utilizing Jones as a driver on a different route. Jones' Wichita Route was not cut every week. (Exh. JJ to Doc. 321).

Prior to November 11, Jones filed nine grievances that related to his bid route being cut ("Bid Elimination Grievances"). (Exh. JJ to Doc. 321). In those grievances, Jones alleged that his Wichita Route had been eliminated on 10

occasions: July 19 (Grievance of July 25), August 9 (Grievance No. 2 of August 15), August 16 (Grievance No. 2 of August 22), August 23 (Grievance of August 27), August 30 (Grievance of September 6), October 4 (Grievance of October 5), October 11 (Grievance of October 12), October 18 (Grievance of October 18), October 21 and 25 (Grievance of October 31). (Exh. JJ to Doc. 321). Prior to November 11, 2002, when Jones' Wichita Route was eliminated, he was usually given the option of driving another route and receiving full pay or staying home without pay. (Jones Depo. pp. 66:7-16; 93:21-24; 95:10-16; 98:1-5; 98:24-99:1; 99:6-21; 101:15-17; 102:1-3). On some days when Jones' bid route was cut he stayed home and on others he chose to work. (Jones Depo. 93:3-102:16).

In addition to his Bid Elimination Grievances, Jones also filed grievances ("Sleeper Team Grievances") alleging that the use of sleeper teams contributed to his bid route being eliminated. In those Sleeper Team Grievances, Jones alleged that sleeper teams had been utilized in violation of the CBA on three occasions: August 10 (Grievance No. 1 of August 15), August 17 (Grievance No. 1 of August 22), and August 24 (Grievance of August 28). (Exh. JJ to Doc. 321). Jones contends in all three of these Sleeper Team Grievances that the use of sleeper teams not only violated the CBA, but contributed to the elimination of his bid route on the previous day. None of the grievances Jones submitted, however, either the Bid Elimination Grievance or the Sleeper Team Grievances, alleged that his bid route was cut because of his age or his union activities. (Exh. JJ to Doc. 321). As stated earlier, Jones' Wichita Route was never eliminated prior to July of 2002. (Jones Depo. p. 32:14-19).

When Jones' grievances regarding the sleeper teams were heard at the local grievance meetings, UPS denied that there was a violation of the CBA. Local 41 appealed the sleeper team grievances to the MoKan panel in August of 2002. After hearing these grievances, the MoKan panel referred them to the Article 43 Committee. After August 22, 2002, Jones filed a few more grievances regarding sleeper teams taking loads from Lenexa. Local 41, however, did not pursue these grievances to the Article 43 Committee.

*3. Reporting of Trailer Departure Time Recording*

In late October or early November of 2002, Jones in his capacity as a Local 41 union steward was investigating the discharge of feeder driver Ed Warczhowski ("Warczhowski") for falsifying information about his breaks and trailer movements. (Jones Depo. pp. 207:13-208:1). Jones met with Saylors to discuss several grievances, including Warczhowski's discharge grievance. During that meeting, Jones told Saylors that some supervisors were allegedly telling feeder drivers to have their trailers noted as departing prior to the drivers actually leaving the Lenexa facility. Jones said that this information would be disclosed in Warczhowski's grievance meetings if Warczhowski was not reinstated. Jones did not provide any specifics in regard to the alleged falsifications. (Jones Depo. p. 231:11-15).

The day after Jones' conversation with Saylors regarding Warczhowski's grievance, Jones received a call from Local 41 business agent Cling Long ("Long"). According to Jones, Long told him that the labor department had complained that Jones had threatened Saylors. (Jones Depo. p. 234:1-17). A few days later, Jones apologized to

Saylors and stated that he had not intended to threaten him with regard to publicizing the information about the departure times in Warczhowski's grievance meetings. (Jones Depo. p. 235:5-13). Jones claims that Saylors became "a little defensive" when Jones broached the subject with Saylors in front of "a room full of drivers". (Jones Depo. p. 237:17-21). Saylors, however, accepted Jones' apology and the meeting ended cordially. (Jones Depo. pp. 236:16-237:8). In this second meeting, Jones again revealed no details about the alleged falsifications. (Jones Depo. pp. 235:19-236:3).

*4. Jones' Termination*

On Monday, November 11, 2002, White and Wetchensky cut Jones' Wichita Route because of decreased volume and because UPS needed Jones as a driver on another route. When Jones arrived to work that day, at approximately 8:15 p.m., Wetchensky, who was the dispatch supervisor, informed him that his route might not be run that night. (Jones Depo. pp. 143:1-6; 152:7-14). Wetchensky further explained that Jones was needed to drive another route, either east to Earth City, Missouri or north to Omaha, Nebraska. (Jones Depo. p. 144:1-10). Jones was told that the cover driver would have first pick of those two routes and that Jones would have to take the other. (Jones Depo. p. 175:3-10).

Later, at approximately 8:30 p.m., Wetchensky confirmed that Jones bid route would not be run that night. (Jones Depo. pp. 147:18-148:7). Jones told Wetchensky that he would "just go home" if UPS was not going to run his bid route. (Jones Depo. p. 144:11-13). According to Jones, in response to Jones' statement that he was going

home, Wetchensky said either "[w]ell, that will be job abandonment," or "[w]hat about job abandonment." (Jones Depo. p. 144:14-22). Jones argued that it was not job abandonment because his bid job had been eliminated. (Jones Depo. p. 145:6-9). Jones then attempted to clock out. The time clock, however, would not function properly so Jones, with Wetchensky's help, filled out a time sheet manually. He then left UPS.

White and Wetchensky told Saylors that Jones had elected not to work even after Wetchensky had alerted Jones to the fact that they needed him to work and had brought up the issue of job abandonment. Based on the statements of White and Wetchensky, Saylors made the decision to terminate Jones for job abandonment. UPS' Feeder Division Manager, Dan Krudys, approved Saylors' decision to terminate Jones based upon Jones' refusal to work as directed after his bid route was eliminated on November 11, 2002. The following day, November 12, 2002, when Jones came to work, he met with White, Wetchensky, and his direct supervisor, Phil Rathbun. Union steward Jerry Graham ("Graham") was also present during this meeting. White informed Jones that he had been discharged for job abandonment because he had left work the previous night. (Jones Depo. p. 156:13-18).

C. Local 41's Representation of Jones on his Termination Grievance

After Jones was terminated from UPS, he drafted a two-page typed statement and signed it. (Jones Depo. pp. 171:24-172:24). A local hearing was held on Jones' Termination Grievance on November 15, 2002. (Jones Depo. p. 184:9-11). Jones was in attendance represented by Local 41 business agent Clint Long. (Jones Depo. p. 184:17-20).

Jones did not object to Long representing him at the local hearing. (Jones Depo. pp. 185:24-186:3). Dan Johnson and Graham were also present on behalf of Local 41. (Jones Depo. p. 184:12-16). UPS was represented at the hearing by Saylors and Don Lewick. (Jones Depo. p. 184:12-16).

Prior to the local hearing, Jones personally obtained written statements from "other drivers that were in the area that were eyewitnesses to the conversation" between Jones and Wetchensky. (Jones Depo. p. 198:14-22). Those statements were brought to the local hearing and presented in support of Jones' case. (Jones Depo. pp. 198:23-199:3). Jones had also prepared a statement in which he expressed his belief that he had been terminated because he had raised questions concerning the accuracy of departure times of feeder trucks from Lenexa. (Jones Depo. pp. 186:4-16-189:2-12). Before reading the statement into the record, Long took a recess and asked Jones if it was really his intention that the statement be presented at the hearing. (Jones Depo. p. 190:3-12). Jones stated that he considered it "was very important that [the departure time issue] become a matter of the record." (Jones Depo. p. 190:3-12). According to Jones' wishes, the statement was covered at the local hearing. (Jones Depo. p. 190:13-16). Jones did not allege that he was terminated because of his age at the time of his discharge or during the local hearing. (Jones Depo. p. 341:2-24). UPS and Local 41 were unable to resolve the issue at the local hearing and, as a result, Jones' Termination Grievance was scheduled to be presented before the MoKan panel.

Before Jones' Termination Grievance progressed to the MoKan panel, Jones spoke with Long on the telephone on a few occasions regarding his representation. (Jones Depo. p. 459:5-10). Jones raised concerns to Long that one of the

statements of UPS had been altered between the local hearing and the pending MoKan hearing. (Jones Depo. pp. 459:16-160:12). Long assured Jones that he would look into the matter. (Jones Depo. p. 460:13-22). At the MoKan hearing, however, UPS did not offer the portions which Jones was concerned had been altered. (Jones Depo. p. 460:13-22). Jones also considered the statements of three other drivers, Paul Tripp ("Tripp"), Jerry Wohletz ("Wohletz"), and Rick Metzger ("Metzger"), to be "extremely important to his case." (Jones Depo. p. 458:14-24). Long spoke with all three drivers both on the telephone and in person before the MoKan hearing. Tripp, Wohletz, and Metzger all appeared at the MoKan panel hearing to present their statements. (MoKan Transcript pp. 0005-0006).

The MoKan panel heard Jones' Termination Grievance on December 3, 2002 in Springfield, Missouri. That day, Jones met with Long prior to the hearing for about 30 minutes to discuss the case. (Jones Depo. p. 471:11-18). The MoKan panel that sat for Jones' grievance hearing consisted of six members. The three members from the Teamsters were Mike Goebel, a representative of Teamsters Local 688 in St. Louis, Missouri; Bill Moore, a representative of Teamsters Local 696 in Topeka, Kansas; and Fred Potts, a representative of Teamsters Local 245 in Springfield, Missouri. UPS was equally represented on the MoKan by managers Bill Margrave, John Samberg, and Leslee Vance. (MoKan Transcript p. 0001).

As is required during a MoKan Panel hearing, UPS presented its case first. UPS was represented by Saylors, Lewick, Baldwin. (MoKan Transcript p. 0001). Saylors first presented a statement from UPS manager White. (MoKan Transcript pp. 0001-0002). White's statement

gave a general outline of UPS' position on the events of November 11, 2002. According to the statement by White, due to a lower volume of priority packages bound for Wichita, it was decided that Jones' Wichita Route would not be run that night. Rather, White instructed Wetchensky to assign Jones to "run East with hot air volume." (MoKan Transcript p. 0001). In his statement, White also asserted that Jones was informed of the assignment, refused to follow instructions, and abandoned his job. (MoKan Transcript p. 0001).

After White's statement was presented, UPS next presented a statement from Wetchensky. (MoKan Transcript p. 0002). Wetchensky's statement recounted that he had informed Jones that his Wichita Route had been cancelled. (MoKan Transcript p. 0002). Wetchensky's statement also asserted that when Jones was informed that he was needed to run another route, Jones stated that he would just go home if his bid route was cut. (MoKan Transcript p. 0002). According to Wetchensky's statement, Jones added that he was not a cover driver. (MoKan Transcript p. 0002). Wetchensky next related to Jones that refusal to work could be considered job abandonment. (MoKan Transcript p. 0002). In response to this contention, Jones argued that his actions were not job abandonment, clocked out, and left UPS. (MoKan Transcript p. 0002).

After UPS rested, Long began his presentation of Jones' case. (MoKan Transcript p. 0003). Long read the statement prepared by Jones for his Termination Grievance into the record, which included Jones' recounting of November 11, 2002. (MoKan Transcript p. 0003-0004). In Jones' statement, he asserted that Wetchensky informed him that his route was cancelled and that he was needed to cover another route. (MoKan Transcript p. 0004). He

recounted that he said he "was not interested in running cover and if [Wetchensky] was going to run [the Wichita Route] I would stay and run it otherwise I would go home." (MoKan Transcript p. 0004). According to Jones' statement, Wetchensky replied that the Wichita Route would not be run and a refusal to run cover as assigned would be job abandonment. (MoKan Transcript p. 0004). Jones then argued that such action was not abandonment and attempted to punch out and go home. (MoKan Transcript p. 0004). The electronic time-clock would not allow Jones to punch out, so Wetchensky aided Jones in clocking out on a paper time card. (MoKan Transcript p. 0004).

Following Jones' statement and in support of Jones' position, Graham read a statement to the panel that asserted that Saylors had ordered the Wichita Route be run in November to avoid having empty trailers in Wichita. (MoKan Transcript p. 0005). Graham also contended that the Wichita Route had been run consistently over the previous five years and had only been cut since August of 2002. Long also had Metzger, Wohletz, and Tripp present their statements to the MoKan panel. (MoKan Transcript pp. 0005-0006). All three statements recounted the exchange between Jones and Wetchensky regarding the elimination of the Wichita and the issue of job abandonment. (MoKan Transcript p. 0006). Long also added that Jones' career had spanned 28 years with UPS and during that time Jones was not subject to any significant disciplinary action. (MoKan Transcript p. 0008).

Jones spoke in support of his grievance. (MoKan Transcript pp. 0006-0008). During this statement, Jones was not interrupted. (MoKan Transcript pp. 0006-0008). He indicated that the Wichita Route had been cut in the past and, on occasions when a route is eliminated, the

driver enjoyed the option of taking other work or going home. (MoKan Transcript p. 0006). Jones claimed that Wetchensky never stated that Jones would be terminated if he left on November 11 and did not request that Jones have a union steward present. (MoKan Transcript p. 0007). He also stated that Wetchensky never informed him of the urgency of the situation or the necessity that Jones stay and work. (MoKan Transcript p. 0007).

Following the rebuttal presentations of both sides, the members of the MoKan panel posed questions to each side. (MoKan Transcript pp. 0012-0016). During the MoKan's questioning, Jones admitted that his run from November 11 was split up and taken by other drivers. (MoKan Transcript p. 0012). Jones also acknowledged that UPS disagreed with the practice Jones had utilized in the past of choosing whether to work or go home when his bid route had been eliminated. (MoKan Transcript p. 0013). In response to questioning from the panel with regard to whether any and all evidence had been presented that Jones had wanted to present, Jones did not object. After this exchange, Jones was allowed to make a final statement to the panel (MoKan Transcript p. 0016). At no point in during the MoKan hearing did Jones allege that he was discharged because of his age. (MoKan Transcript pp. 0001-0017; Jones Depo. p. 307:9-15). At the conclusion of the hearing, Jones was asked if he had been properly represented at the hearing by Local 41 representatives and he responded that he had. (MoKan Transcript p. 0017).

After recessing to consider the matter, the MoKan panel denied Jones' Termination Grievance. (MoKan Transcript p. 0017). Subsequent to Jones' termination from UPS, Jones filled out retirement papers which were

processed in January of 2003. (Jones Depo. pp. 448:19-449:6). As a retiree, Jones is allowed to attend Local 41 meetings, but is not entitled to vote or otherwise formally participate. (Jones Depo. p. 450:4-17).

## III. Standard

Rule 56(c), Federal Rules of Civil Procedure, provides that summary judgment shall be granted if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." If there is no genuine issue about any material fact, summary judgment is proper because it avoids needless and costly litigation and promotes judicial efficiency. *Roberts v. Browning*, 610 F.2d 528, 531 (8th Cir. 1979); *United States v. Porter*, 581 F.2d 698, 703 (8th Cir. 1978). The summary judgment procedure is not a "disfavored procedural shortcut." Rather, it is "an integral part of the Federal Rules as a whole." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *see also City of Mt. Pleasant v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 273 (8th Cir. 1988).

While a summary judgment is a "drastic remedy" which should be exercised with extreme care, it is appropriate against a party who fails to make a showing sufficient to establish that there is a genuine issue for trial about an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Wabun-Inini v. Sessions*, 900 F.2d 1234, 1238 (8th Cir. 1990); *Celotex*, 477 U.S. at 324. The Eighth Circuit has noted that summary judgments should be used sparingly in the employment discrimination context. *Crawford v.*

*Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994). However, there is no "employment discrimination exception" to Rule 56, and as with any other type of suit, a discrimination case which presents no genuine issue of material fact is ripe for summary judgment. *See Berg v. Norand Corp.*, 169 F.3d 1140, 1143 (8th Cir. 1999).

In ruling on a motion for summary judgment, it is the court's obligation to view the facts in the light most favorable to the adverse party and to allow the adverse party the benefit of all reasonable inferences to be drawn from the evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Inland Oil and Transport Co. v. United States*, 600 F.2d 725, 727-28 (8th Cir. 1979). The moving party bears the initial burden of demonstrating by reference to portions of pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, the absence of genuine issues of material fact. However, the moving party is not required to support its motion with affidavits or other similar materials negating the opponent's claim. *Id.* The nonmoving party is then required to go beyond the pleadings and by affidavits, depositions, answers to interrogatories and admissions on file, designate specific facts showing that there is a genuine issue for trial. *Id.* A party opposing a properly supported motion for summary judgment cannot simply rest on allegations and denials in his pleading to get to a jury without any significant probative evidence tending to support the complaint. *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2510 (1986).

At the summary judgment stage, the judge's function is not to weigh the credibility of the evidence, but rather to determine whether a genuine issue of material fact exists. *Id.* A genuine issue of material fact exists "if the evidence

is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The evidence favoring the nonmoving party must be more than "merely colorable." *Id.* at 2511. When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 106 S.Ct. 1348, 1356 (1986) (footnote omitted).

## IV. Discussion

### A. Hybrid Section 301/Duty of Fair Representation

In Count I of his First Amended Complaint, Jones has brought claims against Local 41 and UPS under Section 301 of the LMRA. Jones alleges three distinct violations of the CBA by UPS which engendered two separate breaches of Local 41's duty of fair representation. First, Jones asserts that he was discharged in breach of the CBA allegedly on the basis of his age and for his participation in the Local 41 election and in retaliation for reporting to UPS management his findings with regard to allegedly known and condoned falsification of driver logbooks. Second, Jones argues that Local 41 failed to reasonably pursue and investigate grievances which Jones filed regarding the elimination of his Wichita Route on various occasions. Finally, he contends that Local 41 failed to reasonably pursue and investigate grievances which Jones filed regarding the use of sleeper teams. Defendants now move for summary judgment on these claims asserting that they are entitled to judgment as matter of law on all of Jones' Section 301 claims. Jones opposes this motion arguing that he has established a genuine issue of material

fact for trial and, thus, Defendants are not entitled to summary judgment.

Section 301 of the Labor Management Relations Act, 1947, provides for suits in federal district court for violations of a collective bargaining agreement between a labor organization and an employer. 29 U.S.C. § 185(a). "Section 301 contemplates suits by and against individual employees as well as between unions and employers; and ... encompass those seeking to vindicate 'uniquely personal' rights of employees such as wages, hours, overtime pay, and wrongful discharge." *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562 (1976). The scope of Section 301, however, must be balanced with the methods of resolution contemplated by the collective bargaining contracts. Congress has declared that the "final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes." 29 U.S.C. § 173(d). In other words, "[c]ourts are not to usurp those functions which collective bargaining contracts have properly 'entrusted to the arbitration tribunal.'" *Hines*, 424 U.S. at 562-63. If courts were not required to give deference to the tribunals chosen by the parties to the collective bargaining agreement, such plenary review by the courts "would make meaningless the provisions that the arbitrator's decision is final." *Id.* at 563.

In order to recover on a Section 301 claim, the plaintiff must not only prove that there was a violation of the collective bargaining agreement by the employer, but also that the union failed in its duty to represent the plaintiff. *Smith v. McDonnell Douglas Corp.*, 107 F.3d 605, 607 (8th Cir. 1997). If the plaintiff is unable to establish that the union has breached its duty, the breach of contract claims against the employer for violations of the collective bargaining

agreement fail as a matter of law. *Hines*, 424 U.S. at 570-71 (stating that to prevent against either the company or the union, the plaintiff must not only show that the discharge was contrary to the contract, but must also "carry the burden of demonstrating breach of duty by the Union.").

Aside from the considerable burden placed upon a plaintiff bringing a Section 301 claim, the establishment of a breach of the duty of fair representation is, in itself, an especially difficult task. *Smith*, 107 F.3d at 607. "A union will be found to have breached its duty of fair representation only when 'its conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.'" *Buford v. Runyon*, 107 F.3d 1199, 1202 (8th Cir. 1998). A union's decision on processing a grievance should not be deemed arbitrary unless it appears so unreasonable as to be "irrational". *Air Line Pilots Ass'n Int'l. v. O'Neill*, 499 U.S. 65, 78 (1991). Bad faith in the processing of grievance requires evidence of "fraud, deceitful action, or dishonest conduct." *Baxter v. United Paperworkers Int'l. Union, Local 7370*, 140 F.3d 745, 747 (8th Cir. 1998). Also, discrimination with regard to a union's processing of a grievance requires a showing of "invidious discrimination" that is based on race, gender, or some other immutable characteristic, or "personal prejudice or animus" on the part of the union decisionmaker. *Schwarz v. Brotherhood of Maint. of Way Employees*, 264 F.3d 1181, 1186 (10th Cir. 2001). Mere negligence, poor or mistaken judgment, or ineptitude are insufficient to establish a breach of the duty of fair representation. *Id.* Moreover, the Supreme Court has stated that "[a]ny substantive examination of a union's performance . . . must be highly deferential, recognizing the wide latitude that negotiators need for the effective

performance of their bargaining responsibilities." *O'Neill*, 499 U.S. at 78.

*1. Jones' Termination Grievance*

Defendants contend that they are entitled to summary judgment on Jones' claims under Section 301 because Local 41 adequately represented Jones on his Termination Grievance. Jones' argument in opposition to summary judgment on his Section 301 claims centers mainly around his contentions that "[t]here is a vast quantum of evidence in this case that was available to Local 41's business agents to defend against Steve Jones' termination." (Doc. 373 at p. 457). Jones contends that there "[n]umerous relevant records were in the care, custody and control of UPS at the time Jones' filed his grievance concerning his termination" and that those records would have "demonstrated that the grievance had substantial merit." (Doc. 373 at p. 451). In support of this contention Jones offers pages of examples of evidence which he argues either "should have presented" or "should have investigated" by Local 41 in processing his Termination Grievance. (Doc. 373 at pp. 451-57).

While Jones goes to great lengths to demonstrate that Local 41's representation of him on his termination grievance was insufficient, the substance of his allegations only leads this Court to conclude that Jones misunderstands the nature of the duty of fair representation. It is well settled that union representatives are not lawyers and, therefore, cannot be held to the same standard as attorneys with regard to their knowledge of the law in processing grievances. *Buford v. Runyon*, 160 F.3d 1199, 1203 (8th Cir. 1998). Jones' allegations of "a vast quantum of evidence" and

"numerous relevant records" are attacks upon the competency of the representation and do not impugn Local 41's impartiality. This Court is by no means convinced by Jones' argument, especially when taking into account the applicable standards of law with regard to Section 301 claims. Even if true, the mere fact that evidence was available and overlooked does not rise above mere negligence with regard to Local 41's representation. As stated earlier, negligence is clearly insufficient to establish a triable issue of fact on the breach of the duty of fair representation. Moreover, Jones has failed to establish that Local 41's representation was arbitrary, discriminatory, or in bad faith.

In fact, this Court finds Jones' claim that Local 41 breached its duty of fair representation with regard to his Termination Grievance to be wholly disingenuous given the fact that he admitted that he was properly represented by the union at the MoKan panel hearing. (MoKan Transcript at p. 0017). Furthermore, upon reviewing the transcript of the MoKan hearing and Jones' deposition testimony, there is every indication that Jones was able to present all of the evidence that he deemed worthy of presenting during the processing of his Termination Grievance. In this regard, Jones is unable to establish a genuine issue of fact for trial on his claim that Local 41 breached its duty of fair representation concerning the processing of his Termination Grievance.

*2. Jones' Bid Elimination Grievances*

Jones also claims that Local 41 breached its duty of fair representation with regard to the processing of his Bid Elimination Grievances. As stated above, each time Jones'

Wichita Route was cut, he filed a grievance. It is undisputed that Jones' Wichita Route was never eliminated prior to July of 2002. Between July and October of 2002, Jones filed nine grievance regarding the elimination of his bid route on various days. These included the Grievance of July 25, Grievance No. 2 of August 15, Grievance No. 2 of August 22, Grievance of August 27, Grievance of September 6, Grievance of October 5, Grievance of October 12, Grievance of October 18, Grievance of October 31. (Exh. JJ to Doc. 321). In connection with Local 41's processing of his Bid Elimination Grievance, Jones now argues that Local 41 failed to properly represent him in violation of Section 301.

It is well settled that individual employees do not have an absolute right to have a grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement. *Vaca*, 386 U.S. at 191. A union has the discretion to "supervise the grievance machinery and invoke arbitration" and both the union and the employer strive "in good faith to settle grievances short of arbitration." *Id.* Local 41 determined that Jones' Bid Elimination Grievances lacked merit because there was no evidence to support them.

Jones makes two arguments that Local 41 breach its duty of fair representation with regard to his Bid Elimination Grievances: (1) Local 41 failed to investigate the grievance and request the relevant records and (2) Local 41 postponed the grievance hearings before the MoKan panel and failed to consolidate the Bid Elimination Grievances with Jones' termination grievance. Both of these arguments, however, fail to rise above of mere allegations of negligence and ineptitude.

First, Jones contends that Local 41 breached its duty because it failed to sufficiently investigate the grievances and request the "numerous relevant records" which were in the custody of UPS. (Doc. 373 p. 458). As stated earlier, Jones' argument with regard to the sufficiency of Local 41's investigation is an attack on the competency of the representation and is therefore insufficient to create a genuine issue of fact for trial. Jones further contends with regard to this matter, that Long simply relied on UPS' explanations as to why Jones' route was cut. Even if it were true that further investigation by Local 41 would have revealed substantial merit to the Bid Elimination Grievances, this Court fails to see how such conduct on the part of Long could be seen as anything more than poor judgment. Jones has presented no evidence that Local 41's representation of Jones on the Bid Elimination Grievances was arbitrary, discriminatory, or in bad faith.

Second, Jones argues that Local 41's postponement of the MoKan hearing on the Bid Elimination Grievances and Long's failure to consolidate those grievance [sic] with Jones' Termination Grievance creates a genuine issue of material fact for trial. The Bid Elimination Grievances were first docketed for hearing before the MoKan panel in September of 2002. Local 41 postponed them until October. In October of 2002, the MoKan panel was unable to complete its docket and so the Bid Elimination Grievances were moved to the next MoKan meeting, which was scheduled for December of 2002. Again, Jones' allegations are, at best, claims of negligence or ineptitude and are wholly void of the necessary requirements for maintaining a cause of action for breach of duty of fair representation under Section 301. Because Jones he [sic] has presented no evidence that Local 41's conduct with regard to these

grievances was arbitrary, discriminatory, or in bad faith, he has not shown any of the essential elements necessary to support his claim under Section 301.

*3. Jones' Sleeper Team Grievances*

With respect to Local 41's representation of the Sleeper Team Grievances, Jones argues that he was not fairly represented because Local 41 failed to pursue those grievances even though, according to Jones, they had "substantial merit." (Doc. 373 at 465). As before, however, Jones fails to meet his burden of demonstrating that Local 41's conduct in failing to pursue the Sleeper Team Grievances was either arbitrary, discriminatory, or in bad faith. In essence, his argument remains the same as before: Local 41's representation was negligent and inept. These contentions, however, fail to establish a triable issue of fact with regard to the breach of the duty of fair representation. *O'Neill*, 499 U.S. at 78 (stating that mere negligence, poor or mistaken judgment, or ineptitude are insufficient to establish a breach of the duty of fair representation).

This Court finds that Jones has failed to show an issue of fact with regard to his claim that Local 41 breached its duty of fair representation in the processing of his grievances. As a result, Jones' Section 301 hybrid claims against UPS and Local 41 fail as a matter of law. Accordingly, Defendants' motions for summary judgment on Jones' claims contained in Count I are GRANTED.

### B. Labor Management Reporting and Disclosure Act

In Count III of Plaintiffs' First Amended Complaint, Jones asserts Local 41's conduct in processing his grievances constituted a violation of Section 101 of the LMRDA. In support of summary judgment, Local 41 asserts that Jones' claims for relief under the LMRDA fail as a matter of law because, as a retiree, Jones is unable to claim rights under the LMRDA. In opposition to summary judgment, Jones argues that he did not voluntarily retire, but was forced to find work outside of the craft and, as a result, could no longer avail himself of union membership.

The LMRDA sets forth a bill of rights for union members which protects their rights to assemble and speak freely at union meetings, promote or oppose candidates for union office, and otherwise opine on the business of the organization without punishment or retribution from union leadership. 29 U.S.C. § 411(a)(2). The LMRDA, therefore, is designed to enhance participatory democracy in union affairs. *Wirtz v. Hotel Employees Union*, 391 U.S. 492, 497-98 (1968). As a result, the LMRDA is aimed solely at protecting the relationships between unions and their members and has no bearing upon other relationships. *Phelan v. Local 305*, 973 F.2d 1050, 1056 (2d Cir. 1992), *cert. denied*, 507 U.S. 972 (1993) (stating that the LMRDA does not afford subject matter jurisdiction to federal courts on suits between union members and their employers).

Jones' contends that his rights under the LMRDA were violated because Local 41 mishandled the processing of his grievances in retaliation for his union activities is completely without merit. Such accusations are tantamount to claims for relief under Section 301 for the breach

of the duty of fair representation. This Court finds no reason to rehash its discussion of Jones' Section 301 claims here. Having found above that Jones was unable to present a triable issue of fact with regard to his claim that Local 41's [sic] breached its duty of fair representation in processing his grievances, any claims based on that representation brought under the LMRDA must also fail as a matter of law.

Jones also asserts that he was forced out of Local 41 in violation of his rights under the LMRDA. Jones' argument is apparently that Local 41 violated his rights under the LMRDA because it undertook no effort to assist him in finding other employment in the craft following his termination from UPS. The contention that Jones was somehow forced into retirement by Local 41 is predicated upon the union having an affirmative duty to find him employment. According to Jones, he has been unable to reactivate his union membership because he lost his job at UPS and has been unable to find other employment within the craft, which a prerequisite to union membership. Additionally, he claims that he has been forced to apply for his union retirement pension due to the financial stresses that he has encountered since his termination.

Regardless of the unfortunate circumstances that have befallen Jones since his termination from UPS, he is unable to offer the Court any precedent in support of his claim that demonstrates that Local 41 had an affirmative duty under the LMRDA to aid him in securing employment. Fundamentally, such a duty seems inconsistent with the LMRDA's prophylactic nature. As stated above, the LMRDA is designed to protect the rights between union members to freedom of expression without fear of sanctions by the union. *Finnegan v. Leu*, 456 U.S. 431, 435

(1982). Moreover, the LMRDA applies only to the context of the relationship of a union and its members, and not to any other relationships. *Phelan*, 973 F.2d at 1056. As such, Jones' assertion that Local 41 did not aid him in finding alternative employment in the craft after his termination from UPS fails to demonstrate a genuine is [sic] of fact with regard to LMRDA claim.

Accordingly, Local 41's motion for summary judgment on Jones' claim for relief for violations of his rights under the LMRDA is GRANTED. As a result, all claims for relief asserted by Jones under the LMRDA contained in Count III of the First Amended Complaint are DISMISSED.

### C. Age Discrimination

In Counts VIII and IX of the First Amended Complaint, Jones has alleged disparate treatment age discrimination under the ADEA, KADEA, and MHRA against UPS and Local 41. Although the First Amended Complaint is not sufficiently clear on the matter, Jones is apparently asserting that UPS discriminated against him based on his age by both discharging him and cutting his bid route on approximately 13 occasions. UPS argues that both of these claims fail as a matter of law because Jones cannot establish a prima facie case with regard to either. Jones also claims that Local 41 somehow discriminated against him based on his age. These claims, however, are even more confounding as they seem to be duplicative of his Section 301 duty of fair representation claims. In support of summary judgment, Local 41 contends that Jones' age discrimination claims fail as a matter of law because he has failed to exhaust his administrative remedies and he

is unable to establish that any adverse employment action against him is attributable to Local 41.

In this jurisdiction, an employee's age discrimination claims pursuant both federal and state law, under the ADEA and the MHRA are to are to be analyzed under the same standard. *Fast v. Southern Union Co., Inc.*, 149 F.3d 885, 889 (8th Cir. 1998). When claims are concurrently made under the MHRA, the same analysis applies to both claims. *Rinehart v. City of Independence, Mo.*, 35 F.3d 1263, 1265 n.1 (8th Cir. 1994); *In re Estate of Latimer*, 913 S.W.2d 51, 55 (Mo.App. 1995). Furthermore, claims brought under the KADEA are subject to an identical analysis in the absence of direct evidence of discrimination. *Elza v. Kock Indus., Inc.*, 16 F.Supp.2d 1334, 1340 (D.Kan. 1998) (applying the McDonnell Douglas burden shifting analysis and citing *Beech Aircraft Corp. v. Kansas Human Rights Comm'n*, 864 P.2d 1148 (Kan. 1993)).

The ADEA makes it "unlawful for an employer . . . to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). Everyone forty years or older is considered within the protected class and protected under this Act. *Id.* As stated, Jones was 48 years old at the time of his termination from UPS. The Eighth Circuit has determined that in the absence of "direct evidence" of age discrimination by the Defendant, the analytical framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), is appropriate in ADEA claims.

While Jones has not directly urged this Court to apply the mixed motive analysis from *Price Waterhouse v.*

*Hopkins*, 490 U.S. 228 (1989), he hints at the possibility of such an application in his argument by making allegations of age-based animus against Saylors. The framework set forth in *Price Waterhouse*, as modified by Section 107 of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m), is applied when an employee has put forth direct evidence that "an illegal criterion such as age [], was used in the employer's decision to terminate." *Breeding v. Arthur J. Gallagher and Co.*, 164 F.3d 1151, 1156 (8th Cir. 1999). Under the *Price Waterhouse* analysis, upon a showing of direct evidence of discrimination, an employer is liable for an unlawful employment practice when the plaintiff demonstrates that "an illegitimate criterion was a motivating factor in the adverse employment action, even though other factors also motivated the action." *Browning v. President Riverboat Casino-Missouri, Inc.*, 139 F.3d 631, 634 (8th Cir. 1998). If direct evidence of discrimination is demonstrated, the defendant may attempt to limit the relief the plaintiff is entitled to by showing that it would have made the same decision regarding employment even in the absence of the discriminatory motive. *Id.*

For purposes of the *Price Waterhouse* analysis, "direct evidence" is "conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude . . . sufficient to permit the factfinder to find that attitude was more likely than not a motivating factor in the employer's decision." *Thomas v. First Nat'l Bank*, 111 F.3d 64, 66 (8th Cir. 1998) (quoting *Kriss v. Sprint Comm. Co.*, 58 F.3d 1276, 1282 (8th Cir. 1995)). It is clear, however, that "not all comments that reflect discriminatory attitude will support an inference that an illegitimate criterion was a motivating factor in an employment decision." *Radabaugh*

*v. Zip Feed Mills, Inc.*, 997 F.2d 444, 449 (8th Cir. 1993). The Supreme Court has held that "stray remarks in the workplace," "statements by nondecisionmakers," and even "statements by decisionmakers unrelated to the decisional process itself" are insufficient to constitute "direct evidence" for the purposes of the mixed motive analysis. *Price Waterhouse*, 490 U.S. at 277.

This Court finds that Jones has not demonstrated any direct evidence age-based discrimination that would merit the *Price Waterhouse* analysis. Jones points to a purportedly ageist remark made by Saylors with regard to UPS manager Phil Rathbun, who was 55 years old. Jones also attempts to argue that criticism from Saylors regarding his performance, including late departures and too many restroom breaks is direct evidence of age animus when coupled with Saylors' admission that older drivers had told him that more restroom breaks are required as they get older. None of this evidence, however, is sufficient to merit the *Price Waterhouse* analysis. Moreover, Jones himself has testified that he never heard Saylors, Wetchensky, or White ever make any negative age-based comments to him. (Jones Depo. p. 312:7-18). Accordingly, this Court finds that Jones has not presented direct evidence of age-based discrimination that would require the analysis of his claim for age discrimination under the framework set forth by the Supreme Court in *Price Waterhouse* and, as a result, his claim will be analyzed under the *McDonnell Douglas* framework.

The *McDonnell Douglas* test envisions a burden shifting analysis which allows inferences of discrimination to be drawn based on circumstantial evidence. The purpose of such an analysis is to counteract the shrewd employer who in fact discriminates in employment, yet

leaves no "smoking-gun" as evidence of such activities. *Rothmeier v. Inv. Advisers, Inc.*, 85 F.3d 1328, 1332 (8th Cir. 1996). Under this framework, a plaintiff must first establish a prima facie case of age discrimination. *Id.* at 1332. To establish a prima facie case in an age discrimination claim, the Plaintiffs have the burden of persuasion and production to demonstrate that they: (1) belong to a protected group (over the age of 40); (2) performed job duties at a level that met the employer's legitimate expectations; (3) suffered an adverse employment action; and (4) after the adverse employment action the position(s) was kept open or filled by a substantially younger employee. *Calder v. TCI Cablevision of Missouri, Inc.*, 298 F.3d 723, 729 (8th Cir. 2002).

After establishing this prima facie case, a rebuttable presumption of unlawful discrimination arises. *Rothmeier*, 85 F.3d at 1332. At this point the burden of production, but not the burden of persuasion, shifts to the defendant to articulate some legitimate, non-discriminatory reason for the adverse employment action. *Id.* If the defendant is able to carry this burden of producing admissible evidence of a non-discriminatory reason for the adverse employment action, then the presumption raised by the prima facie case is rebutted and "drops" from the case. *Id.*

The burden of production then shifts back to the plaintiff for the third and final stage of the analysis. At this stage, the *McDonnell Douglas* framework resolves into the ultimate question facing a trier of fact in any disparate treatment suit; whether the employer engaged in intentional discrimination. *Id.* at 1334-35. This "refocused" and "specific" inquiry must discover whether the proffered reasons for the employer's action were actually a pretext for discriminatory animus. *Id.* at 1332. However,

in all practicality, this inquiry must be resolved in two parts. *See id.* at 1336-37.

First, the plaintiff must demonstrate that the employer's proffered reason was merely pretextual; that is, it was not the true reason for the employer's action. *Id.* at 1335. In the summary judgment context, this means the court must find that the plaintiff has "presented sufficient evidence for a jury to disbelieve the reasons proffered by the employer." *Id.* In other words, the plaintiff must present evidence which creates a genuine factual dispute as to the issue of whether the reasons proffered by the defendant are pretextual. However, even if the court is convinced that a reasonable jury could find that the proffered explanation for the adverse employment decision is pretextual, the court may nevertheless "decide as a matter of law that the evidence is insufficient for a reasonable jury to infer age discrimination and therefore may grant summary judgment to the employer." *Id.* at 1335. Therefore, the final barrier a plaintiff must overcome in this analysis is demonstrating unlawful discriminatory intent. Simply creating a factual dispute as to the veracity of the defendant's proffered explanation for the adverse employment action is insufficient to avoid summary judgment. The court must be convinced that a reasonable jury could ultimately infer that age was a determinative factor in the employer's decision. *Id.* at 1334, 1336-37. Pretext alone is not enough, instead, the showing must be that the explanation is pretext for age discrimination.

This is a fact sensitive inquiry. In some cases the overall strength of the prima facie case, in conjunction with the evidence of pretext, may be sufficient to permit an inference of intentional discrimination. *Id.* at 1334-35. In other cases such evidence may not be sufficient to prove

age discrimination and the plaintiff must offer additional evidence of the discriminatory intent of the employer. *Id.* Everything depends on the individual facts of the case and the court must vigilantly recall that the plaintiff bears the ultimate burden of demonstrating a genuine factual dispute as to whether the defendant intentionally discriminated in its employment decisions on the basis of the plaintiff's age.

*1. Jones' Termination by UPS*

In support of summary judgment, UPS contends that Jones is unable to establish a prima facie case for age discrimination. Specifically, UPS contends that Jones cannot demonstrate a genuine issue of material fact with regard to the second element, that he was performing his job at a level that met the legitimate expectations of his employer. Jones has failed to present a cognizable argument against this contention. As such, this Court concludes that UPS is entitled to summary judgment on Jones' claims for age discrimination under federal and state law.

In the Eighth Circuit, the standard for assessing an employee's performance is what the employer could legitimately expect from the employee. *Calder*, 298 F.3d at 729 (citing *Keathley v. Ameritech Corp.*, 187 F.3d 915, 920 (8th Cir. 1999). An employee's ability to meet some expectations of the employer does not satisfy the standard if other, significant expectations are not met. *Ziegler v. Beverly Enterprises-Minnesota, Inc.*, 133 F.3d 671, 676 (8th Cir. 1998). An employer has a legitimate expectation that its employees will not be insubordinate in the performance

of their duties. *Miner v. Bi-State Dev. Agency*, 943 F.2d 912, 913 (8th Cir. 1991).

As stated earlier, Jones' suggestions in opposition to summary judgment is void of any argument as to whether he was meeting the legitimate expectations of his employer. In the gargantuan brief submitted in opposition to the Defendants' motions for summary judgment, Jones has dedicated exactly one paragraph, consisting of 10 lines of type, to rebutting UPS' arguments against his prima facie case for age discrimination (Doc. 373 at pp. 377-378). Even more outrageous, however, is his apparent inability to correctly recognize the elements of the prima facie case for age discrimination. In spite of the fact that UPS expressly attacks the second element of the claim, that Jones cannot establish that he was performing up to the legitimate expectations of his employer, Jones offers absolutely no argument on this issue.

Jones irrelevantly asserts that he was "qualified to be a feeder driver and had been a safe and reliable driver for over 25 years." (Doc. 373 at 377). He further submits that he had received positive evaluations in the years prior to his termination and that his disciplinary record was good. (Doc. 373 at 377). According to Jones, these facts, together with his age, his termination, and his replacement by a 37 year old employee, "constitute a prima facie case for age discrimination." (Doc. 373 at 378). Such an assertion, however, could not be more misguided. While this jurisdiction has recognized positive performance evaluations to be a powerful indicator of satisfactory performance, an employer is free to rely more heavily on recent performance than past performance. *See Erickson v. Farmland Indus., Inc.*, 271 F.3d 718, 728-29 (8th Cir. 2001). Thus, positive evaluations and a sparkling disciplinary record

are of little value in face of termination for job abandonment.

Further, Jones' contention that he is qualified to perform the job is blatantly irrelevant. At issue in establishing a prima facie case for age discrimination is not the employee's qualifications, but his performance in light of the employer's legitimate expectations. *Calder*, 298 F.3d at 729. It is undisputed that, before Jones left UPS on November 11, 2002, that he was informed that his bid route might be eliminated and that he may be needed to cover one of two routes that were not his bid route. (Jones Depo. p. 148:15-23). When it was later confirmed that his bid route had, in fact, been eliminated and that he was needed to drive another route, Jones stated that he was going to go home, even when the dispatch supervisor, Wetchensky, had brought up the issue of job abandonment. (Jones Depo. pp. 147:18-148:3). These facts, even when taken in the light most favorable to Jones, clearly demonstrate his inability to raise a genuine issue of fact for trial on the second element of the prima facie case for age discrimination.

This Court finds that Jones has failed to raise an issue of fact for trial with regard to whether he was performing up to the legitimate expectations of UPS at the time of his termination. As such, UPS is entitled to summary judgment on Jones claims for age discrimination based upon his termination from UPS on November 11, 2002.

*2. The Elimination of Jones' Bid Route by UPS*

Jones also asserts that UPS discriminated against him based on his age by cutting his Wichita Route on 12 or 13 occasions in 2002. UPS contends that it is entitled to summary judgment on this claim because Jones cannot establish a genuine issue of fact for trial with regard to the third element of the prima facie case for age discrimination: that he suffered an adverse employment action.

In order to demonstrate that an action taken by an employer is adverse for the purpose of establishing a prima facie case for age discrimination, the employee must show that the action "produced a material employment disadvantage." *Cooney v. Union Pacific R.R. Co.*, 258 F.3d 731, 734 (8th Cir. 2001) (citing *Spears v. Missouri Dept. of Corrections and Human Resources*, 210 F.3d 850, 853 (8th Cir. 2000)). Not every action by an employer that "makes an employee unhappy is an actionable adverse action." *Manning v. Metropolitan Life Ins. Co., Inc.*, 127 F.3d 686, 692 (8th Cir. 1997). Generally, "[t]ermination, reduction in pay or benefits, or changes in employment that significantly affect an employee's future career prospects" constitute an adverse employment action. *Cooney*, 258 F.3d at 734. The Eighth Circuit has held that changes in an employee's "duties or working conditions that cause no materially significant disadvantage . . . are insufficient to establish" an adverse employment action. *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994).

In opposition to UPS' motion for summary judgment, Jones makes no argument that the elimination of his bid route forms the basis of his claims for age discrimination. (Doc. 373 at pp. 377-381). As far as this Court can gather from Jones' brief references to the "13 separate occasions

prior to November 11, 2002" on which Jones' bid route was eliminated, they were set forth for the purpose of attempting to demonstrate that Jones' November 11 termination for job abandonment was inconsistent with past instances where Jones' bid route was eliminated. (Doc. 373 at p. 379). Judging from his arguments in opposition to summary judgment, Jones has apparently abandoned any separate claim for age discrimination based upon the elimination of his bid route by UPS. As such, this Court has no choice but to find that Jones is unable maintain a claim for age discrimination based upon UPS' elimination of his bid route. Thus, UPS is entitled to summary judgment on those claims.

*3. Age Discrimination Against Local 41*

Jones has also brought claims against Local 41 in his First Amended Complaint for age discrimination. Local 41 has moved this Court to grant summary judgment in its favor asserting that Jones' claims fail as a matter of law for two reasons. First, Local 41 argues that Jones failed to exhaust his administrative remedies. In support of this, Local 41 asserts that the charge of discrimination filed with the Equal Employment Opportunity Commission does not set forth any wrongdoing on the part of Local 41 and the description of discrimination contained therein does not even mention the union. Second, Local 41 argues that Jones is unable to establish a prima facie case for discrimination because there is no evidence that Local 41 took any adverse employment action against him. As with his claim for age discrimination against UPS based upon the elimination of his bid route, Jones has apparently abandoned his claims for age discrimination against Local 41. Again, there is no response to either of the arguments

submitted by Local 41 in support of summary judgment. As such, all claims for age discrimination against Local 41 must fail as a matter of law.

This Court finds that Jones has failed to demonstrate genuine issue of material fact exists for trial with regard to either of his claims for age discrimination. Accordingly, Defendants' motions for summary judgment on Counts VIII and IX of the First Amended Complaint are GRANTED and Jones' claims for age discrimination under the ADEA, KADEA, and MHRA are DISMISSED.

### D. Retaliation

In Count VII of the First Amended Complaint, Jones asserts UPS discharged him in violation of Kansas' whistle-blower retaliation exception to the at-will employment doctrine. UPS moves for summary judgment on this claim contending that Jones can establish neither a prima facie case nor that UPS' reason for discharging him was pretext for retaliatory discharge. In opposition to UPS' motion, Jones argues that there indeed exists an issue of fact for trial not only with regard to the prima facie case, but also with regard to pretext.

The Kansas Supreme Court has held that the "termination of an employee in retaliation for the good faith reporting of a serious infraction of such rules, regulations, or law by a co-worker or an employer to either company management or law enforcement officials (whistle-blowing) is an actionable tort." *Palmer v. Brown*, 752 P.2d 685, 689-90 (Kan. 1988). In order to establish a prima facie case for whistle-blowing retaliation, a plaintiff must establish that (1) a reasonably prudent person would have concluded that the employer was engaged in activities in

violation of rules, regulations, or the law pertaining to public health, safety, and the general welfare; (2) the employer had knowledge of the plaintiff's reporting of such violation prior to the plaintiff's discharge; and (3) there is a causal connection between the reporting of the violation and the discharge. *Herman v. Western Financial Corp.*, 869 P.2d 696, 703-04 (Kan. 1994) (quoting *Palmer*, 752 P.2d at 690). Further, the plaintiff has the burden of proving his case by the preponderance of the evidence. *Rebarchek v. Farmers Cooperative Elevator*, 35 P.3d 892, 897-98 (Kan. 2001). Courts analyzing a claim for whistle-blowing retaliation have utilized the familiar *McDonnell Douglas* burden shifting analysis discussed above. *Boe v. Alliedsignal, Inc.*, 131 F.Supp.2d 1197, 1203 (D. Kan. 2001).

The question here centers around the purpose of keeping records of the driver departure times. The basis for Jones' retaliation claim is that he was allegedly discharged for reporting falsifications and inaccuracies of the driver departure times entered into UPS' internal computer system. Pursuant to the law of Kansas, in order to prevail on claim for whistle-blower retaliatory discharge, the alleged violations that form the basis of the report must be shown by the plaintiff to be violative of "rules, regulations, or the law pertaining to public health, safety, and the general welfare." *Id.* at 703-04 (quoting *Palmer*, 752 P.2d 685).

UPS has asserted that the departure time information kept in its internal computer system is for internal purposes only and neither required to be kept by any government agency nor reported to the public. Consequently, UPS argues that Jones is unable to establish a prima facie case for whistle-blowing retaliation because he cannot demonstrate an issue of fact for trial as to whether the

alleged falsifications are violations of "rules, regulations, or the law pertaining to public health, safety, and the general welfare." *Herman*, 869 P.2d at 703-05. In support of this contention, UPS submits that an employer's internal policies and guidelines are not considered "rules, regulations, or the law" for the purpose of claim for whistle-blower retaliation. *Id.* at 703-04; 705.

Jones argues that UPS' internal computer system serves as the official log book required by the United States Department of Transportation ("DOT") to be kept by feeder drivers. The facts presented to the Court, however, are quite contrary to this position. While Jones vehemently contends that these entries are required by the DOT to be kept in UPS' internal computer system and, ultimately, reported, he has admitted that neither the DOT nor any other governmental entity required that the records be kept or reported. (Doc. 373 at pp. 338-39). Further, Jones has admitted that the information from UPS' internal computer system was not provided to the public. (Doc. 373 at pp. 338-39). Having previously admitted otherwise, Jones cannot now argue that these records are required to be kept by and reported to the DOT. As a result, it is uncontroverted that the information that Jones claims was falsified, namely the departure times of trailers as recorded in UPS' internal computer system, was not required to be kept or reported and was, therefore, strictly intended for internal use by UPS.[2] Thus, Jones is unable

[2] This Court notes that, while Plaintiffs' Response to UPS' Statement of Uncontroverted Facts has been found violative of the Local Rules and the Federal Rules of Civil Procedure and disregarded for the purpose of UPS' motion to dismiss, Jones made no attempt to controvert these facts in their voluminous Memoranda in Opposition to Defendants' Motions for Summary Judgment. (Doc. 373 at pp. 338-39).

to establish a genuine issue of material fact with regard to the first element of the prima facie case for whistle-blowing retaliation.

This Court finds that Jones is unable to establish a prima facie case for whistle-blower retaliation because he has failed to raise an issue of fact for trial with regard to whether the alleged inconsistencies that he reported were violations of a rule, regulation, or law pertaining to public health, safety, and the general welfare. As such, UPS' motion for summary judgment on Jones' claim for whistle-blower retaliation is GRANTED. Accordingly, Jones' claims for relief contained in Count VII of the First Amended Complaint are DISMISSED.

## V. Conclusion

For the forgoing reasons, this Court finds that Stephen E. Jones has failed to demonstrate a genuine issue of material fact with regard to any of his claims for relief contained in the First Amended Complaint. Accordingly, UPS' motion for summary judgment directed towards Jones' claims (Doc. 319) and the portions of Local 41's motion for summary judgment (Doc. 310) that are applicable to Jones' claims are hereby GRANTED. As a result, all claims for relief sought by Stephen E. Jones in the First Amended Complaint are hereby DISMISSED.

**IT IS SO ORDERED.**

/s/ Gary A. Fenner
GARY A. FENNER, JUDGE
United States District Court

DATED: April 7, 2005

**IN THE UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF MISSOURI**
**WESTERN DIVISION**

**JUDGMENT IN A CIVIL CASE**

| | | |
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| **STEPHEN E. JONES and DOYLE CLARK**<br><br>**Plaintiffs,**<br><br>**v.**<br><br>**UNITED PARCEL SERVICE, INC., and LOCAL 41 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS,**<br><br>**Defendants.** | ) | **Case No. 03-0284-CV-W-GAF** |

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ **Decision by Court.** This action came before the Court. The issues have been determined and a decision has been rendered.

**IT IS ORDERED AND ADJUDGED** that

UPS' motion for summary judgment directed towards Doyle Clark's claims (Doc. 318) and the portions of Local 41's motion for summary judgment (Doc. 310) that are applicable to Doyle Clark's claims are hereby GRANTED. As a result, all claims for relief sought by Doyle Clark in the First Amended Complaint are hereby DISMISSED.

**IT IS FURTHER ORDERED AND ADJUDGED that**

UPS' motion for summary judgment directed towards Jones' claims (Doc. 319) and the portions of Local 41's motion for summary judgment (Doc. 310) that are applicable to Jones' claims are hereby GRANTED. As a result, all claims for relief sought by Stephen E. Jones in the First Amended Complaint are hereby DISMISSED.

April 7, 2005
Date

Patricia L. Brune
Clerk

/s/ Tracy L. Diefenbach
(by) Deputy Clerk

2005 WL 1688071

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF MISSOURI**
**WESTERN DIVISION**

| | | |
|---|---|---|
| **STEPHEN E. JONES and DOYLE CLARK** | ) | |
| **Plaintiffs,** | ) | |
| **vs.** | ) | **Case No. 03-0284-CV-W-GAF** |
| **UNITED PARCEL SERVICE, INC., and LOCAL 41 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS,** | ) | |
| **Defendants.** | ) | |

**ORDER**

(Filed July 19, 2005)

Presently before this Court are motions (Docs. 513 and 523) for reimbursement of attorneys' fees from Thomas R. Buchanan, counsel for Plaintiffs, pursuant to 28 U.S.C. § 1927 submitted by Defendant United Parcel Service, Inc. ("UPS") and Local 41 of the International Brotherhood of Teamsters ("Local 41") (collectively as "Defendants"). Defendants claim that they were required to incur excess attorneys' fees in the course of responding to Plaintiffs' Memoranda in Opposition to Defendants' Motions for Summary Judgment (Doc. 373). Mr. Buchanan has opposed this motion. This Court, on its own motion, has already found Document 373 to be violative of Rule 11 of the Federal Rules of Civil Procedure and sanctioned Mr. Buchanan accordingly. For the following reasons, Defendants' motions for attorneys' fees are GRANTED.

Section 1927 of Title 28 provides that an attorney who "multiplies the proceedings in any case unreasonably and vexatiously" may be sanctioned by being "required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. Eighth Circuit courts interpreting 28 U.S.C. § 1927 have held that sanctions thereunder may be imposed "when attorney conduct, viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court." *Lee v. First Lenders Insurance Services, Inc.*, 236 F.2d 443 (8th Cir. 2001) *quoting Lee v. L.B. Sales, Inc.*, 177 F.3d 714, 719 (8th Cir. 1999). "If the attorney conducts the litigation in such a manner that unnecessarily and vexatiously escalates costs, sanctions may be imposed under section 1927." *Lupo v. Rowland and Co.*, 857 F.2d 482, 486 (8th Cir. 1988).

Mr. Buchanan contends that the Defendants have not met the standard required for Section 1927 sanctions, which he asserts contains both objective and subjective components. This Court disagrees. While, in this jurisdiction, the question of whether Section 1927 contains only an objective component arguably remains an open issue, the standard for sanctions under Section 1927 has long been articulated as "when attorney conduct, viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court." *First Lenders*, 236 F.2d at 445. Based upon the iniquities present in Document 373 as detailed in the order on summary judgment, the order to show cause, and the order imposing Rule 11 sanctions (Docs. 506, 508, and 534), this Court can only conclude that Mr. Buchanan's conduct is sanctionable pursuant to Section 1927 under both the objective standard that has been articulated by the Eighth Circuit and

the more stringent subjective standard which Mr. Buchanan now urges the Court to apply.

First, this Court finds that the conduct exhibited in Document 373 clearly satisfies the objective standard set forth by the Eighth Circuit. In its various orders detailing the shortcomings of Document 373, this Court commented in detail concerning not only the oppressive size of the suggestions, which spanned a monumental 480 pages, but also recounted the general untrustworthy nature of the document. (Docs. 506, 508, and 534). Additionally, certain portions were set forth in a manner which this Court found to be completely inconsistent with and violative of the Local Rules and the Federal Rules of Civil Procedure. (Doc. 506). Mr. Buchanan's conduct with regard to Document 373, at the very least, constitutes a reckless disregard for his duty to conduct himself in a manner that promotes the just, speedy, and inexpensive determination of the case at issue. Further, as set forth in the order imposing sanctions under Rule 11, certain portions of Document 373 were, in the opinion of this Court, fashioned intentionally to delay the proceedings and, by their sheer size and mendacious nature, to inhibit meaningful response by opposing counsel. As such, this Court concludes that Mr. Buchanan's conduct satisfies the objective requirement of Section 1927.

Second, this Court remains unconvinced of Mr. Buchanan's contention that the Section 1927 standard in this jurisdiction contains a subjective requirement. By his own admission, the case law regarding this issue in the Eighth Circuit is unclear. *See* Doc. 525, (citing *Schaffhausen v. Bank of America*, 2004 WL 234400, *1 (D.Minn. Feb. 2, 2004)). This jurisdiction has indicated that the language of Section 1927 "appears to require both a finding of objectively

unreasonable behavior and a finding of bad faith." *NAACP v. Atkins*, 908 F.2d 336, 340 (8th Cir. 1990). Beyond this cursory notation, however, the Eighth Circuit has forgone explicitly holding such sanctions to require a finding of subjective bad faith. Indeed, in subsequent decisions regarding the standard for the imposition of Section 1927 sanctions, the Eighth Circuit has always articulated the standard as requiring the attorney's conduct be "viewed objectively" in order to determine whether it manifests "either intentional or reckless disregard of the attorney's duties to the court." *Perkins v. Spivey*, 911 F.2d 22, 36 (8th Cir. 1990); *First Lenders*, 236 F.2d at 445; *L.B. Sales, Inc.*, 177 F.3d at 718. As stated above, Mr. Buchanan's behavior was a sound display of reckless behavior with regard to the Local Rules and the Federal Rules of Civil Procedure. Furthermore, it is the opinion of this Court that Mr. Buchanan's intent in opposing summary judgment with Document 373 was not to defend the case on the merits, but to survive summary judgment by inundating the parties and the Court with pages upon pages of information that was largely irrelevant and inadmissible.

Notwithstanding Mr. Buchanan's contentions, this Court can only conclude based on its earlier findings that the conduct exhibited in this case would easily satisfy a subjective, bad-faith component if Section 1927 were to require such a finding. As detailed in the order imposing sanctions under Rule 11 as well as the order on summary judgement with regard to Plaintiff Clark's claims, this Court has found that portions of this document "were created for the sole purpose of causing unnecessary delay and a needless increase in the cost of litigation." (Docs. 506 at p. 6 and 534 at p. 5). Accordingly, this Court finds that those very same portions of Document 373 unreasonably

and vexatiously multiplied the proceedings in this case in violation of Section 1927.

With regard to the amount of fees recoverable pursuant to Section 1927, the Court has discretion in isolating the expenses reasonably incurred by the parties as a result of the improper conduct. *Tenkku v. Normandy Bank*, 348 F.3d 737, 744 (8th Cir. 2003). Moreover, this is not an exercise that requires great precision. *Id.* Again, the award of attorneys' fees under Section 1927 is within the discretion of the Court. *First Lenders*, 236 F.3d at 445.

In its motion, UPS contends that it incurred $190,092.00 in fees in responding to Document 373. That amount is derived from the 1,043 hours billed by its attorneys multiplied by the various rates of the attorneys that worked on the response, which range from $150.00 to $285.00 per hour. UPS contends that one fourth of that total amount is attributable to the objectionable and inappropriate portions of Plaintiffs' briefing and requests that a total of $47,523.00 in attorneys' fees be reimbursed. In contrast to the team of attorneys employed by UPS, Local 41 employed the services of only one attorney, G. Gordon Atcheson, in preparing its response to Document 373. According to Local 41, Mr. Atcheson spent a total of 173 hours on the response at an hourly rate of $140 per hour. Thus, the total amount billed to Local 41 for the response to Document 373 was $24,220.00. Of that amount, Local 41 estimates that 65 percent of the legal fees can be attributed to Mr. Buchanan's improper conduct and asks that fees be reimbursed in an amount of $15,400.00.

While UPS and Local 41 should receive some compensation for having to respond to portions of a filing that

have been deemed to be improper and unreasonable, the Court finds that the amount requested does not reflect a true assessment of the costs incurred due to Mr. Buchanan's inappropriate conduct. For instance, UPS has included in its submission for reimbursement of attorneys' fees the time that it was billed for the preparation of seven motions to strike improper declarations submitted with Plaintiffs' opposition to summary judgment. (Exhibit A to Doc. 524 at ¶ 11). While no doubt engendered by the filing of Document 373, this Court considers these motions to strike to be outside the scope of fees which Section 1927 contemplates as reasonably incurred. Additionally, while Local 41's estimate is more in line with what this Court would conclude to be fees reasonably incurred due to the impropriety of Document 373, it is the opinion of this Court that the percentage tendered by Local 41 (65%) is excessive. As a result, in its discretion, this Court finds that the amount of $10,000.00 per defendant, which is roughly 41% of the $24,220.00 that Local 41 has represented that it incurred and which this Court considers to be a more sensible estimate of fees reasonably incurred by the Defendants due to Mr. Buchanan's improper conduct with regard to Document 373.

Having concluded that Mr. Buchanan unreasonably and vexatiously multiplied these proceedings by filing Document 373 in the manner in which it was filed, this Court finds that he is subject to sanctions requiring him to reimburse excess costs, expenses, and attorneys' fees to the Defendants pursuant to 28 U.S.C. § 1927. Accordingly, based upon a review the arguments submitted by the parties on this matter as well as this Court's familiarity with the document that is the subject of these sanctions it is hereby ORDERED that Thomas R. Buchanan reimburse

UPS and Local 41 the amount of $10,000.00 each for reasonable attorneys' fees incurred due to the vexatious, unreasonable, and improper filing of Document 373.

**IT IS SO ORDERED.**

/s/ Gary A. Fenner
GARY A. FENNER, JUDGE
United States District Court

DATED: July 19, 2005

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF MISSOURI**
**WESTERN DIVISION**

| | | |
|---|---|---|
| **STEPHEN E. JONES and DOYLE CLARK,** | ) | |
| **Plaintiffs,** | ) | |
| **vs.** | ) | **Case No. 03-0284-CV-W-GAF** |
| **UNITED PARCEL SERVICE, INC.,** | ) | |
| **Defendant.** | ) | |

## ORDER TO SHOW CAUSE

(Filed Apr. 7, 2005)

In its order granting summary judgment in favor of Defendants (Doc. 506) this Court found certain portions of Plaintiffs' Memoranda in Opposition to Defendants' Motions for Summary Judgment (Doc. 373), namely the Statement of Controverted Fact ("Fact Statement")and Responses to Defendants' Statements of Uncontroverted Fact ("Responses"), to be noncompliant with both the Local Rules of this Court and the Federal Rules of Civil Procedure. In doing so, the Court offered multiple examples of egregious misstatements and misrepresentations in a vain attempt to capture the mendacious and dilatory nature of this most burdensome and supremely unprofessional document. The Court found not only that Fact Statement and Responses were severely noncompliant with the Federal Rules of Civil Procedure and the Local Rules of this Court, but also that many of the allegations contained therein were wholly unsupported by any competent, relevant, or admissible evidence.

Rule 11 of the Federal Rules of Civil Procedure requires that by making a representation to the Court in the form of a "pleading, written motion, or other paper" an attorney is certifying that "allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. Fed. R. Civ. P. 11(b)(3). The Rule further states that denials of factual contentions must be "warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief." Fed. R. Civ. P. 11(b)(4).

As a result, Thomas R. Buchanan, as counsel for Plaintiffs and author of Doc. 373, is hereby ordered to show cause within fifteen (15) days as to why this Court should not impose sanctions as a penalty for the numerous and atrocious violations of Rule 11 of the Federal Rules of Civil Procedure. The response to this order to show cause is not to exceed more than 10 pages of double-spaced type.

**IT IS SO ORDERED.**

/s/ Gary A. Fenner
GARY A. FENNER, JUDGE
United States District Court

DATED: April 7, 2005

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF MISSOURI**
**WESTERN DIVISION**

| | | |
|---|---|---|
| **STEPHEN E. JONES and DOYLE CLARK,** | ) | |
| **Plaintiffs,** | ) | |
| **vs.** | ) | **Case No. 03-0284-CV-W-GAF** |
| **UNITED PARCEL SERVICE, INC.,** | ) | |
| **Defendant.** | ) | |

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**IT IS SO ORDERED.**

/s/ Gary A. Fenner
GARY A. FENNER, JUDGE
United States District Court

DATED: April 7, 2005

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 05-2202/05-2205

| | | |
|---|---|---|
| Stephen E. Jones, et al., | * | |
| | * | |
| Appellants, | * | |
| | * | Order Denying Petition |
| v. | * | for Rehearing and for |
| | * | Rehearing En Banc |
| United Parcel Service, Inc., et al., | * | |
| | * | |
| Appellees. | ** | |

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

November 6, 2006

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

## STATUTORY PROVISIONS AND REGULATIONS

1. Rule 56 of the Federal Rules of Civil Procedure provides, in pertinent part:

Rule 56. **Summary Judgment**

**(a).** . . .

**(c) Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

**(e) Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so

respond, summary judgment, if appropriate, shall be entered against the adverse party. . . .

**(g) Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending part or attorney may be adjudged guilty of contempt.

2. Local Rule 56.1, United States District Court for the Western District of Missouri, provides:

**RULE 56.1 SUMMARY JUDGMENT MOTIONS**

**(a)** The suggestions in support of a motion for summary judgment shall begin with a concise statement of uncontroverted material facts. Each fact shall be set forth in a separately numbered paragraph. Each fact shall be supported by reference to where in the record the fact is established. *See* Rule 56(e).

Suggestions in opposition to a motion for summary judgment shall begin with a section that contains a concise listing of material facts as to which the party contends a genuine issue exists. Each fact in dispute shall be set forth in a separate paragraph, shall refer specifically to those portions of the record upon which the opposing party relies, and, if applicable, shall state the paragraph number in movant's listing of facts that is disputed. All facts set forth in the statement of the movant shall be deemed

admitted for the purpose of summary judgment unless specifically controverted by the opposing party.

All facts on which a motion or opposition is based shall be presented in accordance with Rule 56 of the Federal Rules of Civil Procedure. Affidavits or declarations shall be made on personal knowledge and by a person competent to testify to the facts stated. Where facts referred to are contained in another document, such as a deposition, interrogatory answer or admission, a copy of the relevant excerpt from the documents shall be attached.

**(b) Suggestions in Opposition to Summary Judgment.** Within 15 days from the time the suggestions in opposition are filed, a reply brief may be filed.

**(c) Reply Suggestions in Support of Summary Judgment.** Within 15 days from the time the suggestions in opposition are filed, a reply brief may be filed.

460 F.3d 1004

**United States Court of Appeals**
**FOR THE EIGHTH CIRCUIT**

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**No. 05-3215**

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|---|---|---|
| Stephen E. Jones; Doyle Clark<br>Plaintiffs,<br>Thomas R. Buchanan,<br>Appellant,<br>v.<br>United Parcel Service, Inc.; Local 41 of the International Brotherhood of Teamsters,<br>Appellees. | * * * * * * * * * * * * * | Appeal from the United States District Court for the Western District of Missouri. |

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Submitted: March 13, 2006
Filed: August 22, 2006

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Before COLLOTON, HEANEY, and GRUENDER, Circuit Judges.

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COLLOTON, Circuit Judge.

Attorney Thomas Buchanan appeals an order sanctioning him $1,000 pursuant to Rule 11 of the Federal Rules of Civil Procedure, and an order requiring him to reimburse attorneys' fees of $10,000 to United Parcel

Service ("UPS") and $10,000 to Local 41 of the International Brotherhood of Teamsters ("Local 41"), pursuant to 28 U.S.C. § 1927. We affirm.

Buchanan represented Stephen Jones and Doyle Clark in their action against UPS and Local 41 for wrongful termination and inadequate union representation. UPS and Local 41 moved for summary judgment on all counts raised by Jones and Clark, and in response, plaintiffs, through Buchanan, filed a 480-page pleading, which included a 168-page statement of controverted facts, a 179-page response to defendants' statements of uncontroverted facts, and a 132-page argument section. The district court* determined that plaintiffs' pleading violated Local Rule 56.1, disregarded all of plaintiffs' statement of controverted facts, and deemed defendants' statements of uncontroverted facts admitted. *See* W.D. Mo. R. 56.1(a). The court then granted summary judgment for the defendants on all counts. In an opinion filed today, we conclude that the district court did not abuse its discretion in finding a violation of the local rule or in disregarding the noncompliant pleading. *Jones v. UPS, Inc.*, Nos. 05-2202, 05-2205, slip op. at 8-11 (8th Cir. Aug. 22, 2006).

The district court, pursuant to Federal Rule of Civil Procedure 11(c)(1)(B), ordered Buchanan to show cause why he should not be sanctioned, and UPS and Local 41 moved for reimbursement of attorneys' fees pursuant to 28 U.S.C. § 1927. Buchanan's response to the show cause order focused on six specific paragraphs of the plaintiffs' pleading, which the district court had cited as examples of

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* The Honorable Gary A. Fenner, United States District Judge for the Western District of Missouri.

what it described as "misrepresentations and misstatements," or attempts at controversion that were either "unsupported by record or blatantly non-responsive." He requested that if the court intended to base sanctions on "other specific items," then he should have "an adequate opportunity to respond with explanation."

The court's order imposing sanctions addressed Buchanan's statements about notice and opportunity to respond. The court explained that its intention in offering six examples of deficient paragraphs in the pleading was "to provide an outline of the objectionable conduct contained in Document 373 as a whole and not to supply an exclusive list of sanctionable actions." The court reasoned that although Rule 11(c)(1)(B), which permits a court to impose sanctions on its own initiative, requires the court to provide adequate notice prior to levying sanctions, this requirement did not place a burden on the court to enumerate "each and every transgression contained within 480 pages" of the pleading. The court believed that sufficient notice was provided to Buchanan in the order to show cause and the orders granting summary judgment, which were incorporated by reference into the order to show cause.

In explaining its decision to impose sanctions, the court determined that "the length of the document, 480 pages and 948 paragraphs of Fact Statement, when coupled with numerous misstatements and mischaracterizations of the record becomes unduly burdensome." Among other things, "the oppressive size combined with the overall untrustworthy nature of the document had a cumulative effect which [the] Court found to be repugnant to the very concept of judicial economy." The court also found that Buchanan's attempt to justify the length of

plaintiffs' brief by comparing it to the combined length of defendants' three summary judgment motions and two reply briefs was "disingenuous," "ill-conceived," and "irrelevant," because two-thirds of the defendants' pages were devoted to responding to Buchanan's pleading.

Buchanan also responded to defendants' motions for attorneys' fees, interpreting 28 U.S.C. § 1927 to require a finding of both objective unreasonableness and subjective bad faith. He argued that neither UPS nor Local 41 made the requisite showing. In ordering Buchanan to pay fees, the court was unconvinced that the statute requires a showing of subjective bad faith, but found that if it did, then Buchanan's conduct "would easily satisfy a subjective, bad-faith component." The court found that portions of the 480-page pleading "were created for the sole purpose of causing unnecessary delay and a needless increase in the cost of litigation."

In his appeal of the Rule 11 sanction, Buchanan argues that the court did not provide the notice required by Rule 11(c)(1)(B). He further contends that the asserted deficiencies in Document 373 discussed by the court in its order did not violate Rule 11(b), and did not meet the standards for conduct that may be sanctioned under the rule. Buchanan also argues that if there was a proper finding of sanctionable conduct, then the sanction imposed exceeded an amount that was "sufficient to deter repetition of such conduct." *See* Fed. R. Civ. P. 11(c)(2).

We review the district court's determinations concerning Rule 11 under the abuse-of-discretion standard. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). Rule 11 sanctions may be warranted when a pleading is "presented for any improper purpose, such as to harass or to

cause unnecessary delay or needless increase in the cost of litigation," Fed. R. Civ. P. 11(b)(1), contains allegations or factual contentions that lack evidentiary support, Fed. R. Civ. P. 11(b)(3), or contains denials of factual contentions that are not warranted on the evidence. Fed. R. Civ. P. 11(b)(4).

Rule 11 provides a specific procedure to be followed when sanctions are considered. A district court may impose Rule 11 sanctions on its own initiative, but it must first enter an order describing the specific conduct that appears to violate Rule 11(b), and direct the attorney to show cause why he has not violated the rule. Fed. R. Civ. P. 11(c)(1)(B); *see also Fuqua Homes, Inc. v. Beattie,* 388 F.3d 618, 623 (8th Cir. 2004). Then, when imposing sanctions, the court is required to describe the conduct determined to constitute a violation of Rule 11, and explain the basis for the sanction chosen. Fed. R. Civ. P. 11(c)(3).

We are not persuaded by Buchanan's argument that the district court failed to give adequate notice of the specific conduct that appeared to violate Rule 11. The court entered an order to show cause in accordance with Rule 11(c)(1)(B), and the order incorporated by reference the orders granting summary judgment, which detailed the court's objections to Document 373. There is no dispute that the court thereby notified him of six specific paragraphs in the pleading that the court viewed as deficient and exemplary of widespread flaws in the document. The response filed by Buchanan and his law firm to the court's order to show cause acknowledged that upon re-review of Document 373, counsel himself found additional errors in the citation of facts. (R. Doc. 518 at 3 n.5).

The court in its orders granting summary judgment also pointed to other "specific conduct" that it found objectionable. The court referred to "instances in which [plaintiffs] attempt to dispute paragraphs which are supported by testimony from their own depositions." (R. Doc. 506 at 5). Although the court did not cite specific paragraph numbers beyond one prominent example, a review of the defendants' pleadings should readily have revealed to Buchanan other asserted uncontroverted facts that are supported by testimony from the depositions of Jones and Clark. (*E.g.*, R. Doc. 373, Pls.' Resp. to Local 41's Statement of Uncontroverted Facts, ¶¶ 8, 91, 105, 106, Pls.' Resp. to UPS's (Clark) Statement of Uncontroverted Facts, ¶¶ 39, 46, 101, Pls.' Resp. to UPS's (Jones) Statement of Uncontroverted Facts, ¶¶ 77, 120).

The district court further observed that plaintiffs' responses "frequently engage in argument in opposition to Defendants' facts without directing the Court to any portion of the record for support." (R. Doc. 506 at 6). The court gave one example, but other instances again are readily identifiable on a review of Document 373. (*E.g.*, R. Doc. 373, Pls.' Resp. to Local 41's Statement of Uncontroverted Facts, ¶¶ 119, 121, Pls.' Resp. to UPS's (Clark) Statement of Uncontroverted Facts, ¶ 23, Pls.' Resp. to UPS's (Jones) Statement of Uncontroverted Facts, ¶¶ 34, 41, 43, 51, 71, 88). The absence of a listing of all offending paragraphs did not deprive Buchanan of adequate notice that he should explain why many responses to the statements of uncontroverted fact include no citation of the record as required by Local Rule 56.1.

Similarly, the court cited the circumstance that "many of Plaintiffs' attempts to controvert facts do not specifically refer to the portions of the record, but merely contain

cross-references to other paragraphs, which oftentimes have no support." (R. Doc. 506 at 6). Again, while the court provided one example, numerous examples of this cross-referencing technique can be readily identified on review of Document 373. (*E.g.,* R. Doc. 373, Pls.' Resp. to Local 41's Statement of Uncontroverted Facts, ¶¶ 23, 31, Pls.' Resp. to UPS's (Clark) Statement of Uncontroverted Facts, ¶¶ 27, 35, 40, 48, 49, 100, 102, 103, 107, Pls.' Resp. to UPS's (Jones) Statement of Uncontroverted Facts, ¶¶ 35, 37, 121-23, 163). The district court's reference to the tactic gave notice of the "specific conduct" at issue.

The district court also expressed concern that the document was "unwieldy," "gargantuan," "titanic," and "utterly oppressive by means of its sheer size," (R. Doc. 506 at 2-3), particularly in view of the requirement of Local Rule 56.1 that the opposition to a motion for summary judgment begin with a "concise listing of material facts." (*Id.* at 5); W.D. Mo. R. 56.1(a). While this notice is not directed to specific paragraphs of the pleading, it is still a description of "specific conduct" that the court found objectionable. Buchanan was properly notified that he should address why his "concise listing of material facts" spanned 948 paragraphs, and why a 480-page pleading was justified under the circumstances.

As for the substantive decision that Buchanan's conduct was sanctionable, we said in 1990 that the standard under Rule 11 is whether the attorney's conduct, "viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court." *Perkins v. Spivey,* 911 F.2d 22, 36 (8th Cir. 1990). Rule 11 was amended in 1993, and Buchanan argues that the amended rule requires a finding that the attorney's conduct was "akin to contempt of court" and motivated by subjective

bad faith before a court may impose sanctions on its own initiative. This argument draws on commentary of the advisory committee on the rules of civil procedure, which states that "[s]ince show cause orders will ordinarily be issued only in situations that are akin to a contempt of court, the rule does not provide for a 'safe harbor' to a litigant for withdrawing a claim, defense, etc., after a show cause order has been issued on the court's own initiative." Fed. R. Civ. P. 11 advisory committee's note (discussing 1993 amendments to subdivisions (b) and (c)). Buchanan's argument on the governing legal standard was accepted by a divided panel of the Second Circuit. *Compare In re Pennie & Edmonds LLP,* 323 F.3d 86, 90 (2d Cir. 2003), *with id.* at 94-101 (Underhill, J., dissenting).

We have said after the amendment of Rule 11 that the rule should be applied with "particular strictness" when sanctions are imposed on the court's own initiative, *MHC Inv. Co. v. Racom Corp.,* 323 F.3d 620, 623 (8th Cir. 2003), but we have found it unnecessary to decide whether the standard for sanctions initiated under Rule 11(c)(1)(B) is different from, and more stringent than, the standard for sanctions initiated by motion of a party under Rule 11(c)(1)(A). *Norsyn, Inc. v. Desai,* 351 F.3d 825, 831 (8th Cir. 2003). We find it unnecessary to resolve that issue in this case as well, because assuming that Rule 11 does require a finding of subjective bad faith to impose sanctions on a court's own initiative, the district court made such a finding here, and we conclude that the determination was neither clearly erroneous nor an abuse of discretion.

Determinations under Rule 11 often involve "fact-intensive, close calls," *Cooter & Gell,* 496 U.S. at 404 (internal quotation omitted), and "[w]e give '[d]eference to

the determination of courts on the front lines of litigation' because these courts are 'best acquainted with the local bar's litigation practices and thus best situated to determine when a sanction is warranted.' " *MHC Inv. Co.,* 323 F.3d at 624 (quoting *Cooter & Gell,* 496 U.S. at 404). The Supreme Court adopted the deferential abuse-of-discretion standard of review for Rule 11 sanctions with the recognition that it would "streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court." *Cooter & Gell,* 496 U.S. at 404.

We conclude that the district court did not abuse its discretion in determining that Buchanan violated the objective unreasonableness standard of Rule 11. The court reasonably found that the length of Document 373, combined with unsupported attempts to controvert facts (including misstatements and mischaracterizations of the record), failures to provide citations to the record, improper use of cumbersome cross-references, and inappropriate inclusion of legal argument in a purported listing of disputed material facts, made the pleading unduly burdensome. *See generally Jones,* Nos. 05-2202, 05-2205, slip op. at 8-11. The record is sufficient to support the district court's conclusion that, when viewed objectively, Buchanan acted with reckless disregard of his duties to the court, and the court's order adequately explains the basis for this conclusion.

Regarding Buchanan's subjective motivation, the district court specifically found that portions of the pleading "were created *for the sole purpose* of causing unnecessary delay and a needless increase in the cost of litigation." (R. Doc. 534 at 5) (emphasis added). And the

court found that Document 373 represented "a form [of] litigation by attrition, wherein *the practitioner's intent* was to force the opposition either to yield to its position or be crushed under a great weight of misstated factual assertions and drowned in a sea of bombast." (*Id.*) (emphasis added). These are findings that attorney Buchanan acted with an improper purpose and intent, and they amount to a finding of subjective bad faith. Such a finding concerning an attorney's state of mind must necessarily be based on circumstantial evidence and inferences drawn therefrom. Having reviewed Document 373 in detail and in the context of the litigation, we believe the circumstances support the inference drawn by the district court, and the order adequately explains the basis for the findings of purpose and intent. The findings are neither clearly erroneous nor an abuse of discretion. We also conclude that a sanction of $1,000 is reasonable and consistent with the principle that a sanction be "limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." Fed. R. Civ. P. 11(c)(2). Accordingly, the district court did not abuse its discretion in imposing sanctions on Buchanan pursuant to Rule 11.

We also review for abuse of discretion the district court's order that Buchanan reimburse attorneys' fees incurred by UPS and Local 41. *Tenkku v. Normandy Bank,* 348 F.3d 737, 743-44 (8th Cir. 2003). A court may require counsel to satisfy personally attorneys' fees reasonably incurred by an opposing party when counsel's conduct "multiplies the proceedings in any case unreasonably and vexatiously." 28 U.S.C. § 1927. Relying on *dicta* in *NAACP-Special Contribution Fund v. Atkins,* 908 F.2d 336, 340 (8th Cir. 1990), Buchanan argues that § 1927 has both objective and subjective components. Our subsequent

holdings make clear, however, that the statute permits sanctions when an attorney's conduct, "'viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court.'" *Tenkku,* 348 F.3d at 743 (quoting *Perkins,* 911 F.2d at 36); *see also Lee v. First Lenders Ins. Servs., Inc.,* 236 F.3d 443, 445 (8th Cir. 2001). As with sanctions under Rule 11, the district court must provide an attorney with fair notice and an opportunity to be heard before ordering the reimbursement of fees. *Fuqua Homes,* 388 F.3d at 623.

We conclude that the motions filed by UPS and Local 41, which incorporated and expanded on the discussion in the court's orders granting summary judgment and the order to show cause, put Buchanan on notice of the asserted deficiencies in the pleading that he needed to address with respect to § 1927. The district court's reasons for disregarding the non-compliant pleading and imposing Rule 11 sanctions also support a finding that counsel "multiplie[d] the proceedings . . . unreasonably and vexatiously." 28 U.S.C. § 1927. The reimbursement of $10,000 to each defendant was nearly 80% less than the amount requested by UPS and 35% less than the amount requested by Local 41, and we believe it represents a measured determination that does not exceed the fees likely incurred as a result of the vexatious pleading. *See Lee,* 236 F.3d at 446. Accordingly, the district court's order to reimburse fees was not an abuse of discretion.

For these reasons, the orders of the district court are affirmed.

**UNITED STATES COURT OF APPEALS**

**FOR THE EIGHTH CIRCUIT**

No. 05-3215

| | | |
|---|---|---|
| Stephen E. Jones; Doyle Clark,<br>Plaintiffs,<br>Thomas R. Buchanan,<br>Appellant,<br>v.<br>United Parcel Service, Inc.; Local 41 of the International Brotherhood of Teamsters,<br>Appellees. | * | Appeal from the United States District Court for the Western District of Missouri |

**JUDGMENT**

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

(5172-010199) August 22, 2006

Order Entered in Accordance with Opinion:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF MISSOURI**
**WESTERN DIVISION**

| | | |
|---|---|---|
| **STEPHEN E. JONES and DOYLE CLARK,** | ) | |
| **Plaintiffs,** | ) | |
| **vs.** | ) | **Case No. 03-0284-CV-W-GAF** |
| **UNITED PARCEL SERVICE, INC., and LOCAL 41 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS,** | ) | |
| **Defendants.** | ) | |

**ORDER**

(Filed July 19, 2005)

This Court has previously entered an order to show cause (Doc. 508) why sanctions should not be imposed upon Thomas R Buchanan, counsel for Plaintiffs, as a penalty for the numerous and atrocious violations of Rule 11 of the Federal Rules of Civil Procedure relating to the authorship of Plaintiffs' Memoranda in Opposition to Defendants' Motions for Summary Judgment (Doc. 373). After affording Mr. Buchanan an opportunity to respond to the order to show cause, this Court finds for the following reasons that sanctions should be imposed.

The document that is the subject of these sanctions, Document 373, was filed on behalf of the plaintiffs, Doyle Clark ("Clark") and Stephen E. Jones ("Jones") (collectively as "Plaintiffs"), by Mr. Buchanan as suggestions in opposition to three separate motions for summary judgment submitted by the two defendants in this case, United

Parcel Service, Inc. ("UPS") and Local 41 of the International Brotherhood of Teamsters ("Local 41") (collectively as "Defendants"). Local 41 filed one motion (Doc. 310) and suggestions in support (Doc. 312) which were directed at the claims of both Plaintiffs. UPS filed two motions each with suggestions in support which were directed separately at the claims of Clark (Doc. 318 & 320) and Jones (Docs. 319 & 321). In opposition to these motions, Mr. Buchanan submitted Document 373, Plaintiffs' Memoranda in Opposition to Defendants' Motions for Summary Judgment, which totaled 480 pages. In ruling on the motions for summary judgment, this Court found that certain portions of Document 373, namely Plaintiffs' 948 paragraph Fact Statement and Responses to defendants' statements of uncontroverted fact, were noncompliant with the Local Rules of this Court and the Federal Rules of Civil Procedure. (Doc. 506 at p. 7). Additionally, this Court concluded that many factual assertions made in those portions of Document 373 contained misstatements, misrepresentations, and mischaracterizations of the evidence and the record. (Doc. 506 at pp. 2-7). After granting all three of the motions for summary judgment submitted by defendants UPS and Local 41, this Court ordered Mr. Buchanan to show cause why sanctions should not be imposed as a penalty for what this Court concluded were numerous and atrocious violations of Rule 11 of the Federal Rules of Civil Procedure.

The Federal Rules of Civil Procedure contemplate "the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. Attorneys have the an obligation to the Court "to refrain from conduct that frustrates" those aims. Fed. R. Civ. P. 11, Advisory Committee Note to 1993 Amendments. As a result, Rule 11 of the Federal Rules of

Civil Procedure requires that by making a representation to the Court in the form of a "pleading, written motion, or other paper" an attorney is certifying that it "is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Fed. R. Civ. P. 11(b)(1). Moreover, the Rule provides that "allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Civ. P. 11(b)(3). The Rule further states that denials of factual contentions must be "warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief" Fed. R. Civ. P. 11(b)(4).

The imposition of sanctions pursuant to Rule 11 rests squarely within the sound discretion of the district court. *MHC Investment Co. v. Racom Corp.,* 323 F.3d 620, 624 (8th Cir. 2003). Further, district courts are given great deference in determining the propriety of sanctions due to their residence on "the front lines of litigation", a position which affords a unique and apt vantage point from which to make such determinations. *MHC,* 323 F.3d at 624. The Eighth Circuit has stated that the standard for imposing sanctions under Rule 11 is "whether the attorney's conduct 'viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court.'" *Perkins v. General Motors Corp.,* 911 F.2d 22, 36 (8th Cir. 1990) (quoting *Braley v. Campbell,* 832 F.2d 1504, 1512 (10th Cir. 1987)). "The person signing, filing, submitting, or advocating a document has a nondelegable responsibility to the court, and, in most situations is the person to be sanctioned for a violation." Fed. R. Civ. P. 11, Advisory

Committee Note to 1993 Amendments, Subdivisions (b) and (c).

This Court, in its order to show cause, directed Mr. Buchanan to account for the many iniquities contained in Document 373, which he had signed and presented to this Court for consideration. The Court found several violations of the Local Rules and the Federal Rules of Civil Procedure which were outlined in its order granting summary judgment in favor of the defendants (Doc. 506) and cross-referenced in the order to show cause. In concluding that Document 373 was dilatory, mendacious, overly burdensome, and unprofessional, this Court set forth six examples of misstatements and mischaracterizations in an attempt to demonstrate the fundamental shortcomings of the extremely lengthy document. Rather than accounting for the greater issues raised by the Court, Mr. Buchanan's response has merely attempted to explain away the examples cited by the Court as regrettable and unintended mistakes.

It appears that Mr. Buchanan believes that the six examples cited by the Court comprise an exclusive list of the items identified specifically enough to be sanctionable. In fact, he has requested that the Court list with specificity the other items on which the Court intends to base sanctions so that he might have the opportunity to respond with explanation to each and every item. Implied in this request is the position that this Court may only base its sanctions upon the six instances specifically enumerated. Those items, however, were clearly set forth to exemplify similar conduct that occured [sic] throughout the extremely large document on occasions far too numerous to list. The clear intention of this Court in offering those six examples was to provide an outline of the objectionable

conduct contained in Document 373 as a whole and not to supply an exclusive list of sanctionable actions. (Doc. 506 at pp. 3, 5).

The Court is confident in basing the imposition of Rule 11 sanctions upon the whole of Document 373, as illustrated in the order granting summary judgment and referenced in the order to show cause. While *sua sponte* sanctions require that notice be given of the specific conduct that appears to violate Rule 11, this requirement does not place upon the Court the burden of listing each and every transgression contained within 480 pages of Document 373. Indeed, as the Eighth Circuit has upheld the imposition of sanctions based upon the full record of a case, the notice provided by the Court in the order on summary judgment and the order show cause with regard to Document 373 is more than sufficient to satisfy the preference of this jurisdiction that fair notice for the imposition of Rule 11 sanctions be provided by the identification of a specific pleading or document. *See Lupo v. R. Rowland and Co.,* 857 F.2d 482, 485 (8th Cir. 1988). The conduct specified as the basis for sanctions was indeed the very nature and tenor of the Document 373 as a whole, which, as stated earlier, was found by this Court to be mendacious, dilatory, and unprofessional.

Additionally, Mr. Buchanan has asserted that his brief's excessive length was not a specified basis for Rule 11 sanction. (Doc. 518 at p. 9 note 8). Notwithstanding Mr. Buchanan's contention, the length of the document not only played a major role in this Court's decision to enter the order to show cause, but was also specifically enumerated as a significant iniquity of Document 373. In fact, in its order granting summary judgment in favor of the defendants on the claims of Doyle Clark, which was

incorporated by cross-reference into the order to show cause, this Court concluded that many portions of that document, including numerous attempts to controvert the Plaintiffs' sworn deposition testimony, "were created for the sole purpose of causing unnecessary delay and a needless increase in the cost of litigation." (Doc. 506 at p. 6).

While this Court in no way contends that length alone is a sufficient basis for sanctions under Rule 11, the length of the document, 480 pages and 948 paragraphs of Fact Statement, when coupled with numerous misstatements and mischaracterizations of the record becomes unduly burdensome. The tactics employed in Document 373 rely upon neither the trustworthiness of the factual assertions nor the quality of the arguments, but upon the sheer volume of material impressed upon the opposing parties and the Court. It is the opinion of this Court that Document 373 represents a form litigation by attrition, wherein the practitioner's intent was to force the opposition either to yield to its position or be crushed under a great weight of misstated factual assertions and drowned in a sea of bombast. Consequently, the oppressive size combined with the overall untrustworthy nature of the document had a cumulative effect which this Court found to be "repugnant to the very concept of judicial economy." (Doc. 506 at p. 2).

When placed in this context, Mr. Buchanan's attempt to pass over the issue of length is extremely disingenuous considering that the majority of the Defendants' briefing was in direct response to the monstrous proportions of Document 373. Indeed, some of the apologetics contained in the response to the order to show cause (Doc. 518) and the oppositions to the defendants' motions for attorney's fees (Docs. 525 and 531) attempt to justify the length of

Document 373 by comparing it to the combined length of the Defendants' briefing. This ill-conceived argument completely ignores the fact that the majority of the briefing by UPS and Local 41 on their motions for summary judgment was engendered by the impropriety of Document 373. Mr. Buchanon [sic] asserts that while his brief "was long (480 pages) . . . defendants' summary judgment motions and replies were longer (837 pages, including 577 fact contentions)." (Doc. 525 p. 1). The Court finds this comparison to be irrelevant considering that, of the roughly 850 pages constituting the defendants combined briefing on summary judgment (Docs. 312, 320, 321, 426, and 429), almost 600 pages were devoted to responding to Document 373.

After reviewing the record and the memorandum in response to the order to show cause, this Court concludes that Mr. Buchanan violated Rule 11 of the Federal Rules of Civil Procedure by egregiously misstating and mischaracterzing [sic] the record on numerous occasions in Document 373. Additionally, portions of that document have been found by this Court to have been created for the sole purpose of causing unnecessary delay and a needless increase in the cost of litigation. As such, pursuant to Rule 11, this Court finds that sanctions are appropriate as penalty and in order to deter future repetitive conduct. In considering an appropriate amount of Rule 11 sanctions the Court takes into consideration the award of attorneys' fees pursuant to 28 U.S.C. §1927 assessed against Thomas R. Buchanan in Document 535.

Accordingly, it is hereby ORDERED that Thomas R. Buchanan pay into the Court as a penalty for his conduct the amount of $1,000.00.

**IT IS SO ORDERED.**

/s/ Gary A. Fenner
GARY A. FENNER, JUDGE
United States District Court

DATED: July 19, 2005

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

| | | |
|---|---|---|
| Thomas Buchanan, | * | |
| | * | |
| Appellant, | * | Order Denying Petition |
| | * | for Rehearing and for |
| v. | * | Rehearing En Banc |
| | * | |
| United Parcel Service, et al., | * | |
| | * | |
| Appellees. | * | |

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

November 9, 2006

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

FILED
MAR 2 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(2)

No. 06-1099

In The
Supreme Court of the United States

Stephen E. Jones and Doyle Clark,
*Petitioners*,

v.

United Parcel Service, Inc. and
International Brotherhood of Teamsters, Local 41,
*Respondents.*

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**On Petition For Writ of Certiorari**
**To The United States Court of Appeals**
**For The Eighth Circuit**

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# BRIEF OF TEAMSTERS LOCAL 41 IN OPPOSITION

---

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## Question Presented

In their questions presented, Petitioners Stephen E. Jones and Doyle Clark misstate the course of the proceedings below and the actions of the trial judge. In turn, their questions incorrectly characterize the record. The trial judge declined to consider Petitioners' factual recitations made in opposition to summary judgment because they failed to conform to the governing rules. The trial judge then reviewed the record properly before him and decided the motions on the merits, entering judgment for Defendants United Parcel Service and International Brotherhood of Teamsters, Local 41. The question is appropriately stated as:

Whether the trial judge acted in his sound discretion in declining to consider factual assertions that failed to conform to the rules governing summary judgment practice and then properly entered judgment on the record properly before him.

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## Statement of the Case

1. **The Facts.** From the perspective of Respondent International Brotherhood of Teamsters, Local 41, this is a fairly routine duty of fair representation case in which both the trial judge and the U.S. Court of Appeals for the Eighth Circuit found that the Local satisfied the legal duty it owed Petitioners Stephen E. Jones and Doyle Clark as members of the union after United Parcel Service terminated their employment. Neither the claim itself nor the proceedings below reflect extraordinary circumstances or issues justifying review before this Court.

A union must endeavor to represent its members in a way that is not arbitrary, discriminatory, or undertaken in bad faith. *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). A union member who believes the organization has violated that duty may bring what is commonly called a hybrid § 301/DFR claim. To prove the claim, a union member must establish both a breach of a collective bargaining agreement on the part of her employer and a failure of the union to represent her in redressing that breach. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-71(1976).[1]

Petitioners Jones and Clark belonged to Local 41 and worked out of a UPS facility in Lenexa, Kansas. Jones drove a truck from Lenexa to Wichita and back. Clark worked in the facility sorting packages and as a hazardous materials responder. Pet. App. 2. In 2002, Jones and Clark actively participated in the Local union elections – Clark as a candidate and Jones as an organizer – in support of a slate

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1/ Breach of a labor contract gives rise to a violation of § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. And a union's legally inadequate handling of a member's grievance violates the judicially imposed "duty of fair representation." Hence, a union member's cause of action requiring proof of both has become known as a § 301/DFR claim.

opposing the incumbent officers. Clark won a seat on the union executive board, as did Harold McLaughlin, a UPS truck driver who also ran on the opposition slate.

The day following the union election, UPS manager Jeff Johnson fired Clark for insubordination. Pet. App. 3. Clark had been terminated a month earlier for leaving the facility without permission for several hours during his shift, but was reinstated when Local 41 representatives negotiated a two-day suspension in place of the dismissal. Pet. App. 2. Almost a month after the election, UPS manager Lavell White terminated Jones because he walked off the job the evening before rather than drive an alternate run to St. Louis as directed by the dispatcher.[2] Pet. App. 3-4.

Local 41 filed grievances protesting the terminations of Jones and Clark. After unproductive efforts to resolve the grievances with management personnel at UPS's Lenexa facility, Local 41 sought review before what is known as the

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2/ Jones had a peculiar argument that the reassignment during his normal work hours violated the collective bargaining agreement. He should have filed a grievance to test his theory. Jones, however, ignored a basic tenet of labor-management relations – obey now; grieve later – when he simply refused to work. *Crider v. Spectrulite Constortium, Inc.*, 130 F.3d 1238, 1242 (7th Cir. 1997) (A unionized worker was properly terminated for cause when he refused to comply with a reasonable instruction of his employer and, thus, ignored "the time-honored principle of industrial relations that – with few exceptions – an employee must 'obey now and grieve later[.]'"); *Johns-Manville Corp.*, 115 LA 705, 706 (Baroni 2001) ("It is a well-established principle that employees must obey a lawful order, even if it is believed to be incorrect or in violation of the Agreement, and then resort to the grievance procedure for relief. This is known as the 'obey now-grieve later' doctrine.") *Cf. Boys Markets v. Retail Clerks Union*, 398 U.S. 235, 249 (1970) ("Indeed, the very purpose of arbitration procedures [in a collective bargaining agreement] is to provide a mechanism for the expeditious settlement of industrial disputes without resort to strikes, lockouts, or other self-help measures.").

Mo-Kan panel. As the name suggests, the panel hears grievances arising out of contract disputes between UPS and Teamster Locals in Kansas and Missouri. A given panel consists of an equal number of UPS and union representatives, typically three each, with the proviso that the management members be from facilities other than the one out of which the grievance arose and the union members be from different Locals.[3] The Mo-Kan panel receives evidence, hears argument, and, after deliberating in closed session, announces its decision on the grievance. Pet. App. 4-5.

Local 41 Business Agent John Thompson presented Clark's grievance to the Mo-Kan panel and argued for reinstatement. Union steward John Toplikar also spoke to the panel on behalf of Clark. And Clark addressed the panel at length in his own defense. At the conclusion of the hearing, Clark acknowledged to the panel that he had been adequately represented. The panel denied the grievance and upheld the termination. Pet. App. 19-20.

Local 41 Business Agent Clint Long presented Jones's grievance to the Mo-Kan panel and likewise argued for reinstatement. Among other evidence, Long called three witnesses Jones had specifically requested. And Jones offered lengthy comment to the Mo-Kan panel on his discharge. He, too, agreed that he had been adequately represented. The panel denied the grievance and upheld the

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3/ The courts have consistently treated the use of labor-management panels to hear and resolve workplace grievances as the equivalent of arbitration. *Tongay v. Kroger Co.*, 860 F.2d 298, 300 (8th Cir. 1988) ("Members of these committees essentially function as arbitrators on an adjudicatory body[.]"); *Early v. Eastern Transfer*, 699 F.2d 522, 559-60 (1st Cir. 1983), *cert. denied*, 464 U.S. 824 (cases cited therein). *Cf. Hines*, 424 U.S. at 562-63 (treating such panel as equivalent of arbitration in DFR action). The panel members are to exercise independent judgment in the manner of arbitrators rather than functioning as partisans in deciding the grievances. *Tongay*, 860 F.2d at 300.

termination. Id.

Mo-Kan hearings are recorded and, if requested, later transcribed. The transcripts of the hearings for Jones and Clark were authenticated by the business agents and made part of the record on summary judgment and appeal. Thus, the lower courts had detailed, contemporaneous evidence of how Local 41 represented the two. See Pet. App. 47-50, 93-96, 103 (district court specifically cites hearing transcripts).

In short, the Local 41 business agents handling the grievances met with Jones and Clark to discuss information and arguments to be presented in the hearings, articulated positions favorable to them during the hearings, and allowed them to speak at the hearings. Those efforts are the hallmark of appropriate union representation. *See, e.g., Taylor v. Belger Cartage Service, Inc.*, 762 F.2d 665, 668 (8th Cir. 1985) (no actionable DFR claim when union pursued grievance through every step of the process and grievant had an opportunity to speak his piece at the grievance hearings). It is well-settled that union representatives, as laypersons, are not held to the standards of lawyers. *Buford v. Runyon*, 160 F.3d 1199, 1203 (8th Cir. 1998); *Curtis v. United Transp. Union*, 700 F.2d 457, 458 (8th Cir. 1983); *Freeman v. O'Neal Steel, Inc.*, 609 F.2d 1123, 1127 (5th Cir. 1980), *cert. denied*, 499 U.S. 833 (1980) ("The union representative is not a lawyer and cannot be expected to function as one [in processing grievances]."). Moreover, mere negligence or poor judgment (honestly exercised) does not violate the representational duty. *United Steelworkers of America, AFL-CIO v. Rawson*, 495 U.S. 362, 372-73 (1990); *Buford*, 160 F.3d at 1202 ("Mere negligence, poor judgment, or ineptitude by a union is insufficient to establish a breach of the duty of fair representation."); *Walk v. P*I*E* Nationwide, Inc.*, 958 F.2d 1323, 1326 (6th Cir. 1992) ("[A]n unwise or even an unconsidered decision by the union is not necessarily an irrational decision.").

In this case, the record establishes that Local 41 more than adequately represented Jones and Clark. The Eighth Circuit so held: "We have no difficulty concluding that Local 41's representation was not in breach of its duties." Pet. App. 20. Jones and Clark, however, tried to craft a conspiracy theory under which Local 41 and the company joined forces to be rid of them because of their role in the union elections. But they never explained just why UPS should care much about the union's election or why McLaughlin, who was also elected to the union's executive board from the opposition slate, avoided the same fate. Indeed, he was never disciplined at all. See generally Pet. App. 7 n.2; Pet. App. 20 (discounting conspiracy as without evidentiary support). Local 41 fought for Jones and Clark in the way a union should for its members. There is nothing remarkable – or legally improper – about that aspect of the case.[4]

2. **Procedural History.** Jones and Clark, on the one hand, and UPS, on the other, generated the bulk of the voluminous record in this case sparring over various discrimination claims directed at the company alone. Pet. App. 7. In their petition, Jones and Clark nonetheless treat UPS and Local 41 as if they were conjoined twins. But that is hardly a correct portrait of the litigation, as the lower court decisions reflect.

The procedural history of the case is undoubtedly more unusual than the substance of the claims against Local 41. But that history no more warrants review here. The issues raised here focus on the summary judgment proceedings

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4/ Jones and Clark also asserted claims against Local 41 under the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 411, alleging the union inadequately represented them in retaliation for their political activity. Everyone has agreed that if the union satisfied its duty of fair representation both the § 301/DFR claim and the LMRDA claim necessarily would fail. Pet. App. 22-23.

and, in particular, the response of Jones and Clark to the motions Local 41 and UPS filed. Local 41 filed a single summary judgment motion and supporting memorandum directed at all of the claims against it. UPS filed separate motions and memorandums against Jones and Clark. Jones and Clark responded to all three motions in a consolidated opposition – a novel-length document filling 480 pages. Pet. App. 31-32. They have not, however, placed their epic in the appendix to this Court even though it is the centerpiece of the dispute upon which they seek review. The opposition memorandum is, in some respects, difficult to adequately characterize in the abstract. It is extremely long, though length is not its true vice.[5]

As both the district judge and the court of appeals held, the opposition memorandum was filled with statements of purported fact that had no support in the record or that misstated the evidence. In addition, the responses to movants' facts often consisted simply of paragraph after paragraph of argument without any anchor to the record. Pet. App. 10-13 (court of appeals); Pet. App. 32-37 (district court). Both courts readily (and understandably) found the opposition to be in violation of Rule 56.1 of the Local Rules for the U.S. District Court for the Western District of Missouri. Pet. App. 12, 37. The local rule, Pet. App. 139-40, requires facts presented on summary judgment to set forth concisely with specific references to the supporting evidentiary record. And any opposition to the facts must likewise be succinctly stated and referenced in the evidence.

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5/The opposition memorandum begins with 168 pages of additional "facts" to be considered on summary judgment presented in 948 paragraphs. The memorandum then takes 179 pages to respond to the fact statements in the moving papers. And the document concludes with 132 pages of argument in opposition to summary judgment. Pet. App. 32-33.

The examples the lower courts cited amply demonstrate the noncompliant character of the opposition memorandum. Pet. App. 10-11, 33-34. The deficiencies are, in many respects, typified in the response to Local 41's factual assertion that when Clark was terminated for walking off the job on September 18, a first-step hearing was immediately convened because union Business Agent Thompson was already at the UPS facility. As the district court explained, the response consisted of a half-page, single-spaced narrative advocating Jones and Clark's conspiracy theory without so much as a specific citation to the record. Instead, the Petitioners referred generally to their entire 948-paragraph statement of additional facts. Pet. App. 36.

Both courts clearly explained that the deficiencies they cited were *illustrative* of a systemic failing in the factual representations of the opposition memorandum and not meant as an exhaustive listing of the problems. Pet. App. 10-11 (court of appeals); Pet. App. 34 ("[T]he Plainitiffs' 948 paragraph Fact Statement contains numerous and egregious misrepresentations and misstatements. In an effort to illustrate the appalling nature of these representations, the Court offers some examples."), id. 35 ("[T]he occurrences are far too numerous to list here[,] and, therefore, the Court will be forced to offer examples to demonstrate these violations.") (district court). While the opposition memorandum failed to comply with the letter of Local Rule 56.1, it also ignored the spirit, if not the letter, of Fed.R.Civ.P. 56, which requires the evidence offered be of the type that would be admissible at trial. Thus, statements without foundation in the record cannot establish a basis for granting or denying summary judgment.

The trial judge struck the factual statements from the opposition memorandum and proceeded to decided the motions for summary judgment based on the materials properly submitted in compliance with the rules. The court

granted summary judgment to both Local 41 and UPS. Contrary to the implication Jones and Clark cast in their petition, the trial judge *did not* enter judgment against them as sanction for their deficient briefing. Rather, he simply applied Local Rule 56.1 to the papers before him and then determined whether summary judgment was warranted on the merits. The court of appeals found no substantive or procedural error and affirmed.

Upon notice, Pet. App. 133-34, the trial judge later did impose a monetary sanction on counsel for Jones and Clark for the oppressive character of the opposition memorandum, Pet. App. 153-60, and granted motions from Local 41 and UPS for recovery of some attorneys' fees under 28 U.S.C. § 1927, Pet. App. 126-132. Those rulings were also affirmed by the court of appeals in a separate decision, Pet. App. 141-51, and are the subject of a second petition for writ of certiorari, *see Buchanan v. United Parcel Service, et al.*, Case No. 06-1113.

## Argument

### 1. This Case Fails to Meet the Criteria for Review.

a. Review on certiorari and the concomitant investment of this Court's time and resources must be reserved for the truly exceptional case presenting an issue of such significance that it transcends the legal relationship of the parties and would, upon resolution here, recast the governing body of law. Generally, that sort of issue derives from a split among the circuit courts on a significant point of law or from a question of such great import that it will affect a broad spectrum of the citizenry. *N.L.R.B. v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1951) ("Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the

circuit courts of appeal.'") (quoting *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923)). *See, e.g., Hartman v. Moore*, ___ U.S. ___, 126 S.Ct. 1695, 1701 (2006) (certiorari granted to resolve circuit split); *National Cable & Telecommunications Ass'n. v. Brand X Internet Services*, 545 U.S. 967, 980 (2005) (certiorari granted to answer important question of law); *Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004) (important question of law).

This case presents neither. The first two questions presented attempt to pose "important" due process issues without even defining the contours of the right implicated. The final question depends upon an artificially manufactured division among the circuits. Moreover, as the Plaintiffs' petition amply demonstrates, the questions, even as they are fashioned before this Court, are so wedded to the fact-bound circumstances of this case that the answers would strain to establish any significant principles applicable across any measurable breadth of cases. Essentially, Plaintiffs attempt to use certiorari to garner another level of appellate review to reverse a decision they do not like because it goes against them. This Court declines those invitations to serve as a second-tier court of appeals. Sup. Ct. Rule 10.

To the extent Jones and Clark suggest review in this Court may be warranted to remedy a denial of due process, the petition also should be denied because they never asserted a constitutional claim in the court of appeals. *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 895 (1988) (Court declines to consider argument party failed to assert below); *Jenkins v. Anderson*, 447 U.S. 231, 233 n.1 (1980) (same). In their brief to the court of appeals, Jones and Clark argued that the district judge imposed summary judgment as a sanction for the defects in their opposition memorandum and did so without notice. They never suggested a constitutional defect, but rather argued that

they should have been afforded an opportunity to correct the offending papers.

b. A fundamental problem with Jones and Clark's argument lies in its incorrect characterization of the trial judge's ruling. He never imposed judgment against Jones and Clark as a sanction. Rather, he simply applied the Local Rules to the memorandum and then ruled on the merits of the summary judgment motions. In that circumstance, Jones and Clark were not entitled to any notice and opportunity to correct or amend their defective papers. The court of appeals so found. Pet. App. 12-13.

Jones and Clark ignore the distinction between a court's discretion in enforcing procedural rules and its more circumscribed authority to impose sanctions as a punishment for chronic bad behavior, *see, e.g., Chrysler Corp. v. Carey*, 186 F.3d 1016, 1019 (8th Cir. 1999) (court strikes defendant's answer and enters default judgment because party repeatedly lied during discovery). The Tenth Circuit recently discussed the distinction between dismissal as a sanction, on the one hand, and disregard of noncompliant facts and entry of summary judgment on the properly presented record, on the other. *Reed v. Bennett*, 312 F.3d 1190, 1196 (10th Cir. 2002). The appellate court held that a trial judge faced with a party's failure to respond to a motion for summary judgment could enter summary judgment if the unopposed motion were otherwise properly supported *or* she could enter judgment as a sanction after expressly determining the behavior warranted punishment. *Id. See also Wienco, Inc. v. Katahn Associates, Inc.*, 965 F.2d 565, 567-68 (7th Cir. 1992). The trial judge here undertook the former option in disregarding Jones and Clark's purported facts and then deciding the dispositive motions on the merits. The Seventh Circuit has also endorsed that course of action in *Hedrich v Board of Regents of University of Wisconsin*, 274 F.3d 1174, 1177-78

(7th Cir. 2001) (The judge properly disregarded plaintiff's entire factual recitation opposing summary judgment because it contained representations that went on for pages, that were not germane to the assertions, or that were cited to other representations rather than record evidence and then properly rendered judgment on the merits on the remaining record). Jones and Clark cite no authority suggesting such an approach to be improper or constitutionally deficient.

Instead, they cite several district court cases in which the judges declined to strike fact statements for noncompliance with local rules. While a ruling to that effect lies within the trial court's discretion, it is not constitutionally mandated. Rather, it is properly characterized as an act of judicial grace. *See, e.g., Little v. Cox's Supermarkets*, 71 F.3d 637, 641 (7th Cir. 1995) (within trial court's discretion to strictly enforce local rules or to forgive violations). Jones and Clark have no right to such dispensation, and the trial judge was not obligated to afford it to them.[6]

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6/ Moreover, those cases are factually distinguishable. In *CTC Communications Corp. v. Bell Atlantic Corp.*, 77 F.Supp.2d 124, 128 n.3 (D. Me. 1999), the trial court perused a noncompliant 19-page statement of facts. The burden in doing so would have been minimal compared to searching Jones and Clark's fact statements for properly supported assertions amidst the representations either incorrectly cited or not cited at all and unfounded argument spread over 347 pages – nearly 20 times the length of the statement in *CTC Communications*. In *Helm Financial Corp. v. Iowa Northern Railway Company*, 214 F.Supp.2d 934, 961 (N.D. Iowa 2002), the trial judge declined to strike the nonmovant's summary judgment response for failing to affirmatively state that no additional facts were being offered, although the local rule required such a representation. The trial court correctly characterized that failure as a "technical" noncompliance with the local rule.

The appellate courts universally have entrusted the rejection of insufficiently supported fact allegations to the trial judge's sound discretion. *See, e.g., Hedrich*, 274 F.3d at 1178; *Bordelon v. Chicago School Reform Bd. of Trustees*, 233 F.3d 524, 524 (7th Cir. 2000); *A.M. Capen's Co., Inc. v. American Trading & Production Corp.*, 202 F.3d 469, 472 n.4 (1st Cir. 2000). They do not require that the trial judge find a pattern of contumacious behavior or weigh lesser "sanctions" as an alternative. *Wienco, Inc.*, 965 F.2d at 567-68. Jones and Clark offer no compelling reason to reject that settled approach. To the contrary, local rules themselves provide sufficient notification to the parties and their counsel as to litigation obligations. Failure to follow those rules requires no further notice or allowance for correction. The courts require even parties representing themselves to comply with such procedural rules. *See McNeil v. U.S.*, 508 U.S. 106, 113 (1993) ("[W]e have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel.").

Moreover, rules such as Local Rule 56.1 make summary judgment practice manageable for both courts and litigants by isolating the operative facts and the supporting evidence. *Bordelon*, 233 F.3d at 527 (rules aid judges and parties by "imposing some discipline on the pretrial process");*Ruiz Rivera v. Riley*, 209 F.3d 24, 27-28 (1st Cir. 2000). Counsel who would ignore those requirements turn summary judgment practice into a quagmire of legal paper or, as the First Circuit put it, "cat and mouse" games. *Ruiz Rivera*, 209 F.3d at 28. The court of appeals so noted in this case, as well. Pet. App. 9-10.[7]

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7/Jones and Clark arguably constructed their 480-page brief to thwart entry of summary judgment not so much on the merits but through sheer oppressiveness. The trial judge saw it that way. Pet. App. 158

To abandon the existing approach would lead to untoward results. In this case, for example, Local 41 and UPS had spent considerable time and money filing reply briefs on summary judgment. Had the trial judge allowed Jones and Clark to submit a "revised" memorandum in opposition, Local 41 and UPS would have incurred even further costs in preparing a second set of replies. Similarly, a party failing to file a timely opposition to a summary judgment motion need not be given notice and the opportunity to submit papers late before the trial court rules on the pending motion. *See Wienco, Inc.*, 965 F.2d at 567. Yet that would be precisely the result of the rule Jones and Clark advocate here.

**2. Jones and Clark were Afforded Due Process.**

a. Even had Jones and Clark presented a due process argument to the court of appeals (which they did not), they fail to articulate any compelling issue for this Court. In fact, they do not even outline the dimensions of the due process right they contend they have been denied. Instead, they hawk the claim as if it were the legal equivalent of a medicine show elixir – a cure-all for any adverse result in a lower court. And like the barker, they don't mention the ingredients that go into the product.

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("It is the opinion of this Court that Document 373 [Plaintiffs' opposition memorandum] represents a form litigation by attrition[.]"). The court of appeals also characterized the opposition memorandum as "unduly burdensome" as a result of its "misstatements and mischaracterizations of the record, failures to provide citations to the record, improper use of cumbersome cross-references, and inappropriate inclusion of legal argument in a purported listing of disputed material facts[.]" Pet. App. 149. And the court of appeals found ample support for the trial judge's conclusion that the opposition was intended to prevent an orderly disposition of the summary judgment motions. Pet. App. 149-50.

Due process, in the constitutional sense, is an extraordinarily malleable concept intended to provide fair notice under the circumstances before a party can be deprived of a protectable interest. *See generally, Quill Corp. v. North Dakota By and Through Heitkamp*, 504 U.S. 298, 312 (1992) ("'notice' or 'fair warning'" often referred to as "the analytical touchstone of due process"); *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 314 (1950) (due process satisfied through notice "reasonably calculated, under all the circumstances to apprise interested parties" of the contemplated action). This Court has described the protection this way: "Procedural due process imposes constraints on government decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

Jones and Clark do not identify a protectable property interest in their petition. It could be the right to jury trial in civil proceedings protected in the Seventh Amendment or a property interest in their causes of action. In either instance, however, this Court has recognized that summary judgment and its attendant procedural rules afford constitutional due process. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 336 (1979) (summary judgment does not violate Seventh Amendment right to jury trial) (citing *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 319-20 (1902); *Galloway v. United States*, 319 U.S. 372, 389 (1943) (Notwithstanding the Seventh Amendment, the court has authority to enter judgment against party when evidence is legally insufficient to submit case to jury) (citing Fed.R.Civ.P. 50); *Fidelity & Deposit Co.*, 187 U.S. at 319-20 (precursor to Fed.R.Civ.P. 56 did not deprive litigant of due process or right to jury trial).

Likewise, Jones and Clark do not explain how Local Rule 56.1 or Fed.R.Civ.P. 56 deprived them of due process. As the

court of appeals noted, the rules sufficiently define what is expected of litigants in establishing a factual record supporting or opposing summary judgment and in outlining the consequences of failing to meet those expectations. Pet. App. 12. Thus, counsel for Jones and Clark had adequate notice from the rules themselves that noncompliant factual representations would be discounted. *See Wienco, Inc.*, 965 F.2d at 568 (no due process violation in entering summary judgment against party based on movant's facts when party fails to timely controvert those facts); *Oglesby v. Terminal Transport Co., Inc.*, 543 F.2d 1111, 1112-13 (5th Cir. 1976) (no due process violation when trial judge entered summary judgment against plaintiff because his unsworn statement was inadequate to controvert defendant's factual representations).

In short, Jones and Clark were not deprived of notice as to the potential result when, acting through their counsel, they submitted an opposition to summary judgment that failed to comply with both the letter and spirit of the governing local rule and the Federal Rules of Civil Procedure. Accordingly, they were afforded the process they were constitutionally due.

b. In their second point, Jones and Clark argue a variation of the same theme. They suggest some due process deprivation lurks in the trial judge's decision to strike the whole of their factual representations for nonconformity with Local Rule 56.1. As noted earlier, however, any such consideration would have been an act of judicial indulgence and was neither required under the rule nor by constitutional mandate.

Just as a trial judge need not comb the record to find support for a party's statements of fact on summary judgment, *Ammons v. Aramark Uniform Services, Inc.*, 368 F.3d 809, 818 (7th Cir. 2004); *Ashley Creek Phosphate Co. v.*

*Chevron USA, Inc.*, 315 F.3d 1245, 1257 n.13 (10th Cir. 2003); *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996), she need not pick and choose among hundreds of representations when a substantial number of them plainly violate the governing procedural or evidentiary rules, *Bordelon*, 233 F.3d at 528-29. The judge has the discretion to find an entire fact statement noncompliant with the rules. *Id.* (The trial court acted within its discretion to strike a party's entire fact statement because it was "so full of argument, evasion, and improper denials that it defeat[ed] the whole point" of the local rules.).

**3. There is No Division Among the Circuits.**

Finally, Jones and Clark contend there are two circuit splits as a result of the court of appeals decision in this case. But that claim is incorrect. The decision here is not at odds with summary judgment processes employed in other jurisdictions.

First, Jones and Clark assert that the Eighth Circuit's approach in affirming summary judgment in this case based on the movants' papers and supporting record conflicts with what the Second Circuit had done in *Giannullo v. City of New York*, 322 F.3d 139, 143 n. 5 (2d Cir. 2003). In *Giannullo* , the court of appeals held that to the extent a party moving for summary judgment had an obligation to establish facts in support of its position the record evidence must back up the factual statements in the moving papers even if the opposing party failed to contest them. The court, however, also recognized that a party may proceed on summary judgment by asserting that the nonmoving party cannot adduce sufficient evidence to demonstrate a genuine dispute of material fact on an issue on which she bears the ultimate burden of proof. And if the nonmoving party fails to produce such evidence, judgment should be granted. *Id.* at 141 n.2. That essentially is the rule of *Celotex Corp. v.*

*Catrett*, 477 U.S. 317, 322-23 (1986).

Here, Jones and Clark had the ultimate burden of proof on their § 301/DFR claims to show that Local 41's processing of their grievances was arbitrary, discriminatory, or undertaken in bad faith. Once the trial judge declined to consider their factual assertions, they could not satisfy their obligation on summary judgment to demonstrate a material dispute. The course the trial judge undertook and which the court of appeals affirmed is consistent with *Celotex* and its application as outlined in *Giannullo*.

In addition, the record evidence – particularly the transcripts of the Mo-Kan hearings on Jones and Clark's grievances – establishes that Local 41 satisfied its duty of representation. Thus, even if there were some difference in approach between the Second and Eighth Circuits in handling unopposed factual representations on summary judgment, that difference would neither affect the outcome in this case nor otherwise alter the legal relationship among the parties as it now exits.

Second, Jones and Clark suggest a circuit split between the Seventh and Eighth Circuits insofar as the trial judge here reviewed facts presented in the opposition memorandum without then considering the entire record. They cite *Nabozny v. Podlesny*, 92 F.3d 446, 450-51 (7th Cir. 1996), but fail to accurately present the rule in that case. The court of appeals actually recognized that a trial judge should not go beyond the moving papers to credit legal arguments that had not been presented or to extract uncited evidence from the record *in support of a motion* for summary judgment without then reviewing the complete record.

But the trial judge here did not do so. What he actually did was to consider evidence arguably favorable to Jones and Clark but which neither UPS nor Local 41 had presented in support of the motions for summary judgment. See, e.g.,

Pet. App. 65, 78, 112, 116. The trial judge, however, found that evidence insufficient to avert summary judgment.[8] Thus, the rule in *Nabozny* has no application in this case, since the additional evidence can only be considered favorable to Jones and Clark as the parties opposing summary judgment. The claimed circuit split is wholly artificial.

## Conclusion

The petition for writ of certiorari should be denied for want of any substantial issue or an actual division among the circuits on a significant question of federal law.

Respectfully submitted,

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8/ All of the additional evidence concerns Jones and Clark's claims against UPS and not their claims against Local 41.